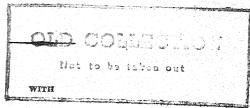


SIR WILLIAM JONES.



THE LIFE OF THE AUTHOR,

BY

LORD TEIGNMOUTH.

IN THIRTEEN VOLUMES,

VOLUME VIII.

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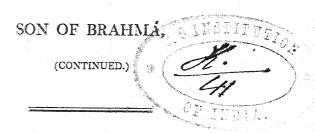
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LAWS OF MENU,



CHAPTER THE NINTH.

On Judicature; on Law, Private and Criminal; and on the Commercial and Servile Classes.

- 1. 'I NOW will propound the immemorial duties of man and woman, who must both remain firm in the legal path, whether united or separated.
- 2. Day and night must women be held by their protectors in a state of dependence; but in lawful and innocent recreations, though rather addicted to them, they may be left at their own disposal.
- 3. 'Their fathers protect them in childhood; 'their husbands protect them in youth; their 'fons protect them in age: a woman is never 'fit for independence.

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- 4. 'Reprehensible is the father, who gives
- onot his daughter in marriage at the proper
- time; and the husband, who approaches not
- ' his wife in due season; reprehensible also is
- · the fon, who protects not his mother after the
- death of her lord.
 - 5. Women must, above all, be restrained
- ' from the smallest illicit gratification; for, not
- being thus restrained, they bring sorrow on
- both families:
 - 6. ' Let husbands consider this as the supreme
- ' law, ordained for all classes; and let them,
- ' how weak foever, diligently keep their wives
- ' under lawful restrictions;
 - 7. For he, who preferves his wife from
- ' vice, preserves his offspring from Suspicion of
- · bastardy, his ancient usages from neglect, his
- ' family from disgrace, himself from anguish, and
- ' his duty from violation.
 - 8. 'The husband, after conception by his
- wife, becomes himfelf an embryo, and is born
- 'a fecond time here below; for which reason
- the wife is called jáyá, fince by her (jáyaté)
- 'he is born again:
 - 9. ' Now the wife brings forth a fon endued
- with fimilar qualities to those of the father;
- ' fo that, with a view to an excellent offspring,
- ' he must vigilantly guard his wife.
 - 10. 'No man, indeed, can wholly restrain

women by violent measures; but, by these expedients, they may be restrained:

of the collection and expenditure of wealth, in purification and female duty, in the preparation of daily food, and the superintendence of household utensils.

- 12. 'By confinement at home, even under affectionate and observant guardians, they are not secure; but those women are truly secure, who are guarded by their own good inclinations.
- 13. 'Drinking Spirituous liquor, affociating with evil persons, absence from her husband, rambling abroad, unseasonable sleep, and dwelling in the house of another, are six faults which bring infamy on a married woman:
- 14. 'Such women examine not beauty, nor pay attention to age; whether their lover be handsome or ugly, they think it is enough that he is a man, and pursue their pleasures.
- 15. 'Through their passion for men, their mutable temper, their want of settled affection, and their perverse nature (let them be guarded in this world ever so well) they soon be-
- ' come alienated from their husbands.
- 16. 'Yet should their husbands be diligently 'careful in guarding them; though they well

' know the disposition, with which the lord of

creation formed them:

17. ' MENU allotted to fuch women a love of

their bed, of their feat, and of ornament, im-

· pure appetites, wrath, weak flexibility, defire

of mischief, and bad conduct.

18. Women have no business with the

• texts of the Veda; thus is the law fully fettled:

having, therefore, no evidence of law, and no

· knowledge of expiatory texts, finful women

' must be as foul as falsehood itself; and this is

'a fixed rule.

19. 'To this effect many texts, which may

fhow their true disposition, are chanted in the

' Védas: hear now their expiation for fin.

20. "That pure blood, which my mother

"defiled by adulterous defire, frequenting the

"houses of other men, and violating her duty

" to her lord, that blood may my father pu-

"rify!" Such is the tenour of the holy text,

which her son, who knows her guilt, must pro-

onounce for her;

21. ' And this expiation has been declared

for every unbecoming thought, which en-

ters her mind, concerning infidelity to her

'husband; since that is the beginning of adul-

f tery.

22. Whatever be the qualities of the man,

with whom a woman is united by lawful

- 6 marriage, fuch qualities even she assumes;
- blike a river united with the fea.
 - 23. 'ACSHAMA'LA', a woman of the lowest
- birth, being thus united to VASISHT'HA, and
- 'Sa'rangi', being united to Mandapa'la,
- were entitled to very high honour:
 - 24. 'These, and other females of low birth,
- have attained eminence in this world by the
- respective good qualities of their lords.
 - 25. 'Thus has the law, ever pure, been pro-
- s pounded for the civil conduct of men and
- women: hear, next, the laws concerning
- children, by obedience to which may happi-
- e ness be attained in this and the future life.
 - 26. 'WHEN good women, united with huf-
- bands in expectation of progeny, eminently
- fortunate and worthy of reverence, irradiate
- the houses of their lords, between them and
- ' goddeffes of abundance there is no diverfity
- whatever.
- 27. 'The production of children, the nur-
- ture of them, when produced, and the daily
- fuperintendence of domestick affairs, are pe-
- culiar to the wife:
 - 28. 'From the wife alone proceed offspring,
- ' good household management, solicitous atten-
- ' tion, most exquisite caresses, and that heavenly
- ' beatitude, which she obtains for the manes of
- ancestors, and for the busband himself,

29. She, who deserts not her lord, but

keeps in subjection to him her heart, her

fpeech, and her body, shall attain his mansion

in heaven, and, by the virtuous in this world,

be called Sádhwì, or good and faithful;

30. But a wife, by disloyalty to her hus-

band, shall incur disgrace in this life, and be

born in the next from the womb of a shakal,

or be tormented with horrible diseases, which

punish vice.

31. LEARN now that excellent law, univer-

· fally falutary, which was declared, concerning

iffue, by great and good fages formerly born.

32. 'They consider the male issue of a wo-

man as the fon of the lord; but, on the fub-

'ject of that lord, a difference of opinion is

mentioned in the Véda; fome giving that

name to the real procreator of the child, and

others applying it to the married possessor of

the woman.

33. 'The woman is confidered in law as the

field, and the man as the grain: now vegeta-

ble bodies are formed by the united operation

of the feed and the field.

34. In some cases the prolifick power of the male is chiefly distinguished; in others,

the receptacle of the female; but, when both

are equal in dignity, the offspring is most

' highly esteemed:

35. 'In general, as between the male and female powers of procreation, the male is held

6 superiour; fince the offspring of all procreant

beings is distinguished by marks of the male 6 power.

36. 'Whatever be the quality of feed, fcat-

' tered in a field prepared in due season, a plant

of the fame quality springs in that field, with

e peculiar visible properties.

- 37. Certainly this earth is called the pri-' meval womb of many beings; but the feed
- exhibits not in its vegetation any properties

of the womb.

- 38. On earth here below, even in the same
- ploughed field, feeds of many different forms,
- having been fown by husbandmen in the
- 'proper season, vegetate according to their ature:
 - 39. 'Riceplants, mature in fixty days, and
- those, which require transplantation, mudga,
- ' tila, másha, barley, leaks, and sugarcanes all

fpring up according to the feeds.

- 40. 'That one plant should be fown, and
- another produced, cannot happen: whatever
- feed may be fown, even that produces its

oproper stem.

- 41. Never must it be sown in another
- e man's field by him, who has natural good
- fense, who has been well instructed, who

'knows the Véda and its Angas, who defires long life:

42. 'They, who are acquainted with past times, have preserved, on this subject, holy strains chanted by every breeze, declaring, that "feed must not be sown in the field of another man."

43. 'As the arrow of that hunter is vain, 'who shoots it into the wound, which another had made just before in the antelope, thus instantly perishes the seed, which a man

' throws into the foil of another:

44. 'Sages, who know former times, consider this earth (Prit'hivi) as the wife of king Prithu; and thus they pronounce cultivated land to be the property of him, who cut away the wood, or who cleared and tilled it; and the

f antelope, of the first hunter, who mortally f wounded it.

45. Then only is a man perfect, when he

felf, and his fon; and thus have learned Bráh-

" mens announced this maxim: " The husband

" is even one person with his wife," for all do-

· mestick and religious, not for all civil, purposes.

46. Neither by fale nor defertion can a wife be released from her husband: thus we

fully acknowledge the law enacted of old by

the lord of creatures.

47. Once is the partition of an inheritance

' made; once is a damiel given in marriage;

and once does a man fay "I give:" thefe

' three are, by good men, done once for all and

" irrevocably.

48. As with cows, mares, female camels,

flave girls, milch buffalos, shegoats, and ewes,

it is not the owner of the bull or other father,

who owns the offspring, even thus is it with

the wives of others.

49. 'They, who have no property in the

field, but, having grain in their possession,

fow it in foil owned by another, can receive

no advantage whatever from the corn, which

" may be produced:

50. 'Should a bull beget a hundred calves

on cows not owned by his master, those

6 calves belong folely to the proprietors of

the cows; and the strength of the bull was

wasted:

51. 'Thus men, who have no marital pro-

e perty in women, but fow in the fields owned

by others, may raise up fruit to the husbands;

but the procreator can have no advantage

from it.

52. 'Unless there be a special agreement

between the owners of the land and of the

feed, the fruit belongs clearly to the land-

- owner; for the receptacle is more important than the feed:
- 53. But the owners of the feed and of the foil may be confidered in this world as joint
- owners of the crop, which they agree, by
- fpecial compact in confideration of the feed,
- to divide between them.
- 54. Whatever man owns a field, if feed,
- conveyed into it by water or wind, should
- germinate, the plant belongs to the land-
- owner: the mere fower takes not the fruit.
 - 55. Such is the law concerning the off-
- fpring of cows, and mares, of female camels,
- goats, and sheep, of slave girls, hens, and
- ' milch buffalos, unless there be a special agree-
- · ment.
- 56. Thus has the comparative importance
- f of the foil and the feed been declared to you:
- · I will next propound the law concerning
- women, who have no iffue by their hufbands.
- 57. The wife of an elder brother is con-
- fidered as mother-in-law to the younger; and
- the wife of the younger as daughter-in-law to
- f the elder:
- 58. The elder brother, amorously approaching the wife of the younger, and the
- younger, careffing the wife of the elder, are
- both degraded, even though anthorized by the

* husband or spiritual guide, except when such swife has no issue.

59. On failure of iffue by the husband, if he be of the fervile class, the defined offspring may be procreated, either by his brother or

fome other sapinda, on the wife, who has been

duly authorized:

60. 'Sprinkled with clarified butter, filent, in the night, let the kinfman thus appointed beget one fon, but a fecond by no means, on the widow or childless wife:

61. 'Some fages, learned in the laws concerning women, thinking it possible, that the
great object of that appointment may not be
obtained by the birth of a single son, are of opinion, that the wife and appointed kinsman
may legally procreate a second.

62. 'The first object of the appointment being obtained according to law, both the brother and the widow must live together like a father and a daughter by affinity.

63. 'Either brother, appointed for this pur'pose, who deviates from the strict rule, and
'acts from carnal desire, shall be degraded, as
'having desiled the bed of his daughter-in-law
'or of his father.

64. 'By men of twiceborn classes no widow, or childless wife, must be authorized to conceive by any other than her lord; for they,

who authorize her to conceive by any other, violate the primeval law.

65. 'Such a commission to a brother or other

'near kinsman is nowhere mentioned in the

' nuptial texts of the Veda; nor is the marriage

of a widow even named in the laws con-

cerning marriage.

66. 'This practice, fit only for cattle, is re-

prehended by learned Brahmens; yet it is de-

clared to have been the practice even of men,

while VE'NA had fovereign power:

67. He, possessing the whole earth, and

* thence only called the chief of fage monarchs,

gave rife to a confusion of classes, when his

intellect became weak through luft.

68. Since his time the virtuous disapprove

of that man, who, through delufion of mind,

directs a widow to receive the careffes of another

for the fake of progeny.

69. 'The damfel, indeed, whose husband

· shall die after troth verbally plighted, but

before consummation, his brother shall take in

* marriage according to this rule:

70. 'Having espoused her in due form of

· law, she being clad in a white robe, and pure

in her moral conduct, let him approach her

once in each proper feason, and until issue

· be had.

71. LET no man of fense, who has once

- ' given his daughter to a suitor, give her again
- to another; for he, who gives away his
- ' daughter, whom he had before given, incurs
- the guilt and fine of speaking falsely in a
- cause concerning mankind.
 - 72. 'Even though a man have married a
- ' young woman in legal form, yet he may aban-
- don her, if he find her blemished, afflicted
- with difease, or previously deflowered, and
- ' given to him with fraud:
- 73. 'If any man give a faulty damfel in
- e marriage, without disclosing her blemish, the
- husband may annul that act of her illminded
- egiver.
 - 74. 'SHOULD a man have business abroad,
- elet him affure a fit maintenance to his wife,
- and then refide for a time in a foreign country;
- fince a wife, even though virtuous, may be
- ' tempted to act amis, if she be distressed by
- want of subfistence:
- 75. While her hufband, having fettled her
- maintenance, refides abroad, let her continue
- firm in religious austerities; but, if he leave
- 'her no support, let her subsist by Spinning and
- other blameless arts.
 - 76. 'If he live abroad on account of some
- ' facred duty, let her wait for him eight
- ' years; if on account of knowledge or fame,

fix; if on account of pleasure, three: after those terms have expired, she must follow him.

77. 'For a whole year let a husband bear

with his wife, who treats him with aversion;

bui, after a year, let him deprive her of her sepa-

rate property, and cease to cohabit with her. 78. She, who neglects her lord, though ad-

dicted to gaming, fond of spirituous liquors,

or diseased, must be deserted for three months,

and deprived of her ornaments and household

furniture:

79. 'But she, who is averse from a mad hus-

band, or a deadly finner, or an eunuch, or one

' without manly strength, or one afflicted with

' fuch maladies as punish crimes, must neither

be deferted nor stripped of her property.

80. A WIFE, who drinks any spirituous

' liquors, who acts immorally, who shows

' hatred to her lord, who is incurably difeased,

who is mischievous, who wastes his property,

'may at all times be superseded by another

wife.

81. 'A barren wife may be superseded by another in the eighth year: she, whose chil-

dren are all dead, in the tenth; she, who

brings forth only daughters, in the eleventh;

fhe, who speaks unkindly, without delay;

82. But she, who, though afflicted with

- ' illness, is beloved and virtuous, must never be
- ' difgraced, though she may be superseded by
- another wife with her own confent.
 - 83. ' If a wife, legally superfeded, shall de-
- ' part in wrath from the house, she must either
- ' instantly be confined, or abandoned in the
- ' presence of the whole family:
 - 84. But she, who, having been forbidden,
- 'addicts herself to intoxicating liquor even at
- ' jubilees, or mixes in crowds at theatres, must
- ' be fined fix racticas of gold.
- 85. 'When twiceborn men take wives, both
- of their own class and others, the precedence,
- ' honour, and habitation of those wives, must
- be fettled according to the order of their
- classes:
 - 86. 'To all fuch married men, the wives of
- the fame class only (not wives of a different
- ' class by any means) must perform the duty
- of personal attendance, and the daily business
- relating to acts of religion;
- 87. For he, who foolishly causes those
- "duties to be performed by any other than his
- ' wife of the same class, when she is near at
- hand, has been immemorially confidered as a
- mere Chandála begotten on a Bráhmení.
 - 88. 'To an excellent and handsome youth
- of the fame class, let every man give his
- daughter in marriage, according to law; even

though she have not attained her age of eight
years:

89. ' But it is better, that the damsel,

- though marriageable, should stay at home till
- her death, than that he should ever give her
- in marriage to a bridegroom void of excellent

qualities.

- 90. 'Three years let a damsel wait, though
- 's she be marriageable; but, after that term, let
- her chuse for herself a bridegroom of equal
- rank:
 - 91. If, not being given in marriage, she
- chuse her bridegroom, neither she, nor the
- youth chosen, commits any offence;
 - 92. But a damsel, thus electing her hus-
- band, shall not carry with her the ornaments,
- which she received from her father, nor those,
- ' given by her mother or brethren: if she carry
- them away, she commits theft.
 - 93. 'He, who takes to wife a damsel of full
- age, shall not give a nuptial present to her
- father; fince the father loft his dominion
- over her, by detaining her at a time, when
- fhe might have been a parent.
- 94. 'A man, aged thirty years, may marry
- a girl of twelve, if be find one dear to his
- heart; or a man of twenty-four years, a
- camsel of eight: but, if he finish his studentship
- earlier, and the duties of his next order would

otherwise be impeded, let him marry immediately.

95. A wife, given by the gods, who are named in the bridal texts, let the husband re-

ceive and support constantly, if she be vir-

tuous, though he married her not from in-

clination: fuch conduct will please the gods.

96. 'To be mothers were women created;

and to be fathers, men; religious rites, there-

fore, are ordained in the Ve'da to be performed

by the husband together with the wife.

97. 'IF a nuptial gratuity has actually been given to a damfel, and he, who gave it, should

die before marriage, the damfel shall be mar-

* ried to his brother, if she consent;

98. But even a man of the servile class

ought not to receive a gratuity, when he gives

his daughter in marriage; fince a father, who

takes a fee on that occasion, tacitly fells his

daughter.

99. 'Neither ancients nor moderns, who

were good men, have ever given a damfel in

marriage, after she had been promised to an-

other man;

100. Nor, even in former creations, have

we heard the virtuous approve the tacit sale of

a daughter for a price, under the name of a

" nuptial gratuity.

101. "Let mutualfidelity continue till death:"

this, in few words, may be confidered as the

fupreme law between husband and wife.

102. Let a man and woman, united by

marriage, constantly beware, lest, at any

time difunited, they violate their mutual

· fidelity.

103. 'Thus has been declared to you the

· law, abounding in the purest affection, for

the conduct of man and wife; together with

• the practice of raising up offspring to a husband

of the servile class on failure of issue by him be-

gotten: learn now the law of inheritance. 104. ' After the death of the father and the

mother, the brothers, being affembled, may

divide among themselves the paternal and

* maternal estate; but they have no power over

it, while their parents live, unless the father

· chuse to distribute it.

105. The eldest brother may take entire

opossession of the patrimony; and the others

may live under him, as they lived under their

s father, unless they chuse to be separated.

106. By the eldest, at the moment of his

birth, the father, having begotten a fon, dif-

charges his debt to his own progenitors; the

eldest son, therefore, ought before partition to

manage the whole patrimony:

107. 'That fon alone, by whose birth he discharges his debt, and through whom he

- attains immortality, was begotten from a
- fense of duty: all the rest are considered by
- the wife as begotten from love of pleafure.
 - 108. Let the father alone support his fons;
- and the first born, his younger brothers; and
- ' let them behave to the eldest, according to
- ' law, as children should behave to their father.
 - 109. 'The first born, if virtuous, exalts the
- * family, or, if vitious, destroys it: the first born
- is in this world the most respectable; and the
- ' good never treat him with disdain.
 - 110. 'If an elder brother act, as an elder
- brother ought, he is to be revered as a mother,
- as a father; and, even if he have not the be-
- ' haviour of a good elder brother, he should be
- ' respected as a maternal uncle, or other kins-
- e man.
- III. Either let them thus live together,
- or, if they defire separately to perform religious
- rites, let them live apart; fince religious du-
- ties are multiplied in separate houses, their
- e feparation is, therefore, legal and even laud-
- able.
- 112. The portion deducted for the eldest is
- 'a twentieth part of the heritage, with the best
- of all the chattels; for the middlemost, half
- of that, or a fortieth; for the youngest, a
- e quarter of it, or an eightieth.
 - 113. 'The eldest and youngest respectively

* take their just mentioned portions; and, if

there be more than one between them, each

of the intermediate fons has the mean portion,

or the fortieth.

114. Of all the goods collected, let the first

· born, if he be transcendantly learned and vir-

· tuous, take the best article, whatever is most

excellent in its kind, and the best of ten cows

or the like:

115. But, among brothers equally skilled in performing their several duties, there is no

deduction of the best in ten, or the most excel-

· lent chattel; though some trifle, as a mark of

greater veneration, should be given to the first

born.

116. 'If a deduction be thus made, let equal

fhares of the refidue be afcertained and re-

· ceived; but, if there be no deduction, the

fhares must be distributed in this manner:

117. 'Let the eldest have a double share,

and the next born, a share and a half, if they

clearly surpass the rest in virtue and learning;

the younger fons must have each a share: if

' all be equal in good qualities, they must all take

. Share and Share alike.

118. 'To the unmarried daughters by the fame mother, let their brothers give portions

out of their own allotments respectively, ac-

cording to the classes of their several mothers:

' let each give a fourth part of his own distinct

' fhare; and they, who refuse to give it, shall

' be degraded.

119. Let them never divide the value of a

fingle goat or sheep, or a single beast with

uncloven hoofs: a fingle goat or sheep re-

'maining after an equal distribution belongs to

the first born.

120. 'Should a younger brother in the man-

" ner before mentioned have begotten a son on the

' wife of his deceased elder brother, the division

' must then be made equally between that fon,

who represents the deceased, and his natural fa-

"ther: thus is the law fettled.

121. 'The representative is not fo far wholly

fubstituted by law in the place of the deceased

' principal, as to have the portion of an elder fon;

' and the principal became a father in confe-

quence of the procreation by his younger bro-

' ther; the fon, therefore, is entitled by law to

' an equal share, but not to a double portion.

122. 'A younger fon being born of a first married wife, after an elder fon had been

born of a wife last married, but of a lower

' class, it may be a doubt in that case, how the

division shall be made:

123. Let the fon, born of the elder wife,

take one most excellent bull deducted from

the inheritance: the next excellent bulls are

for those, who were born first, but are inserior on account of their mothers, who were married last.

124. A fon, indeed, who was first born, and brought forth by the wife first married, may take, if learned and virtuous, one bull and fifteen cows; and the other sons may then take, each in right of his several mother;

fuch is the fixed rule.

125. As between sons, born of wives equal in their class and without any other distinction, there can be no seniority in right of the mother; but the seniority ordained by law, is

according to the birth.

126. 'The right of invoking Indra by the texts, called fwabrahmanya, depends on actual priority of birth; and of twins also, if any such be conceived among different wives, the eldest is he, who was first actually born.

127. 'He, who has no fon, may appoint his daughter in this manner to raise up a son for him, faying: "the male child, who shall be born from her in wedlock, shall be mine for the purpose of performing my obsequies."

128. 'In this manner DACSHA himself, lord of created beings, anciently appointed all his 'fifty daughters to raise up sons to him, for the sake of multiplying his race:

129. ' He gave ten to DHERMA, thirteen to

- CASYAPA, twenty-seven to Soma, king of
- ' Brahmens and medical plants, after doing ho-
- on nour to them with an affectionate heart.
 - 130. 'THE son of a man is even as himself;
- and as the fon, fuch is the daughter thus ap-
- ' pointed: how then, if he have no fon, can any
- inherit his property, but a daughter, who is
- closely united with his own foul?
 - 131. Property, given to the mother on
- her marriage, is inherited by her unmarried
- ' daughter; and the fon of a daughter, appoint-
- ed in the manner just mentioned, shall inherit
- the whole estate of her father, who leaves no
- s fon by himself begotten:
 - 132. 'The fon, however, of fuch a daughter,
- who fucceeds to all the wealth of her father
- dying without a fon, must offer two funeral
- cakes, one to his own father, and one to the
- 6 father of his mother.
- 133. Between a ion's fon and the fon of
- fuch a daughter, there is no difference in law;
- fince their father and mother both sprang
- from the body of the same man:
 - 134. But, a daughter having been appoint-
- ed to produce a fon for her father, and a fon,
- begotten by bimself, being afterwards born, the
- division of the heritage must in that case be
- equal; fince there is no right of primogeni-
- ture for a woman.

135. Should a daughter, thus appointed to

raife up a fon for her father, die by any ac-

cident without a fon, the husband of that

daughter may, without hesitation, possess him-

felf of her property.

136. By that male child, whom a daughter

thus appointed, either by an implied intention

or a plain declaration, shall produce from an

husband of an equal class, the maternal grand-

father becomes in law the father of a fon:

'let that son give the funeral cake and possess

the inheritance.

137. By a fon, a man obtains victory over

' all people; by a fon's fon, he enjoys immor-

'tality; and, afterwards, by the fon of that

grandson, he reaches the solar abode.

138. 'Since the fon (trayaté) delivers his

father from the hell named put, he was,

therefore, called puttra by BRAHMA' himfelf:

139. 'Now between the fons of his fon and

of his daughter thus appointed, there subsists in

this world no difference; for even the fon of

' fuch a daughter delivers him in the next, like

the fon of his fon.

140. Let the son of such a daughter offer

the first funeral cake to his mother; the se-

cond to her father; the third, to her paternal

grandfather.

141. Or the man, to whom a fon has been

- ' given, according to a subsequent law, adorned
- with every virtue, that fon shall take a fifth
- or fixth part of the heritage, though brought
- from a different family.
 - 142. A given fon must never claim the
- family and estate of his natural father: the
- funeral cake follows the family and estate;
- but of him, who has given away his fon, the
- funeral oblation is extinct.
 - 143. 'THE son of a wife, not authorized to
- have iffue by another, and the fon begotten,
- by the brother of the husband, on a wife, who
- has a fon then living, are both unworthy of
- the heritage; one being the child of an adul-
- terer, and the other produced through mere
- · luft.
 - 144. 'Even the son of a wife duly authorized,
- ' not begotten according to the law already pro-
- ' pounded, is unworthy of the paternal estate;
- for he was procreated by an outcast:
 - 145. 'But the fon legally begotten on a wife,
- ' authorized for the purpose before mentioned,
- ' may inherit in all respects, if he be virtuous and
- elearned, as a fon begotten by the husband;
- ' fince in that case the feed and the produce be-
- 6 long of right to the owner of the field.
 - 146. 'He, who keeps a fixed and moveable
- estate of his deceased brother, maintains the
- ' widow, and raises up a son to that brother,

· must give to that son, at the age of fifteen, the

whole of his brother's divided property.

147. 'Should a wife, even though legally

authorized, produce a fon by the brother, er

any other fapinda, of her husband, that son, if

· begotten with amorous embraces, and tokens of

impure desire, the sages proclaim baseborn

and incapable of inheriting.

148. 'This law, which has preceded, must be

understood of a distribution among sons be-

gotten on women of the same class: hear now

' the law concerning fons by several women of

different classes.

149. 'If there be four wives of a Brabmen

in the direct order of the classes, and sons are

produced by them all, this is the rule of par-

tition among them:

150. 'The chief fervant in husbandry, the

bull kept for impregnating cows, the riding

horse or carriage, the ring and other ornaments,

and the principal meffuage, shall be deducted

from the inheritance and given to the Bráb-

* men fon, together with a larger share by way

of preeminence.

151. Let the Bråhmen take three shares of

the refidue; the fon of the Cshatriya wife,

* two shares; the son of the Vaifya wife, a share

and a half; and the fon of the Sudra wife,

" may ta'te one share.

152. 'Or, if no deduction be made, let some

' person learned in the law divide the whole

collected estate into ten parts, and make a

· legal distribution by this following rule:

153. Let the son of the Brahmani take four

parts; the fon of the Cshatriya, three; let the

' son of the Vaifyá have two parts; let the son

of the Súdra take a fingle part, if be be vir-

6 tuous.

154. 'But whether the Brahmen have fons,

or have no fons, by wives of the three first

classes, no more than a tenth part must be

' given to the fon of a Súdra.

155. 'The son of a Bráhmen, a Cshatriyá, or

a Vaifyá by a woman of the fervile class, shall

' inherit no part of the estate, unless he be vir-

' tuous; nor jointly with other fons, unless his mo-

ther was lawfully married: whatever his fa-

ther may give him, let that be his own.

156. All the fons of twiceborn men, pro-

duced by wives of the same class, must divide

' the heritage equally, after the younger bro-

thers have given the first born his deducted

allotment.

157. 'For a Súdra is ordained a wife of his

own class, and no other: all, produced by her,

I shall have equal shares, though she have a

· hundred fons.

158. OF the twelve fons of men, whom

- MENU, sprung from the Self-existent, has
- named, fix are kinfmen and heirs; fix, not
- heirs, except to their own fathers, but kinfmen. 159. 'The fon begotten by a man himself
- ' in lawful wedlock, the fon of his wife begotten
- * in the manner before described, a fon given to
- * him, a fon made or adopted, a fon of concealed
- * birth, or whose real father cannot be known, and
- * a fon rejected by his natural parents, are the
- 4 fix kinfmen and heirs:
 - 160. 'The fon of a young woman unmarried,
- * the fon of a pregnant bride, a fon bought, a
- fon by a twice married woman, a fon felf-
- given, and a fon by a Súdra, are the fix kinf-
- " men, but not heirs to collaterals.
 - 161. 'Such advantage, as a man would gain,
- who should attempt to pass deep water in a
- boat made of woven reeds, that father obtains,
- who passes the gloom of death, leaving only
- contemptible fons, who are the eleven, or at least
- the fix, last mentioned.
 - 162. 'If the two heirs of one man be the
- fon of his own body and a fon of his wife by
- a kinfman, the former of whom was begotten
- · after his recovery from an illness thought incura-
- ble, each of the fons, exclusively of the other,
- · shall succeed to the whole estate of his natural
- father.
 - 163. The fon of his own body is the fole

- heir to his estate, but, that all evil may be re-
- ' moved, let him allow a maintenance to the
- frest;
 - 164. And, when the fon of the body has
- taken an account of the paternal inheritance,
- ' let him give a fixth part of it to the fon of
- ' the wife begotten by a kinfman, before his fa-
- ther's recovery; or a fifth part, if that son be
- eminently virtuous.
 - 165. 'The fon of the body, and the fon of
- ' the wife may succeed immediately to the pa-
- ' ternal estate in the manner just mentioned; but
- the ten other fons can only fucceed in order
- to the family duties and to their share of the
- ' inheritance, those last named being excluded by
- ' any one of the preceding.
 - 166. Him, whom a man has begotten on
- his own wedded wife, let him know to be the
- first in rank, as the son of his body.
 - 167. 'He, who was begotten, according to
- · law, on the wife of a man deceased, or im-
- opotent, or difordered, after due authority given
- 6 to her, is called the lawful fon of the wife.
 - 168. 'He, whom his father, or mother with
- ' her husband's assent, gives to another as his
- fon, provided that the donee have no issue, if
- the boy be of the fame class and affectionately
- difposed, is considered as a son given, the gift
- · being confirmed by pouring water.

169. He is considered as a son made or adopted, whom a man takes as his own son,

the boy being equal in class, endued with filial

* virtues, acquainted with the merit of perform-

· ing obsequies to his adopter, and with the fin of

a omitting them.

170. 'In whose mansions soever a male child shall be brought forth by a married wo-

* man, whose husband has long been absent, if the

real father cannot be discovered, but if it be

• probable that he was of an equal class, that child

belongs to the lord of the unfaithful wife, and

is called a fon of concealed birth in his man-

fion.

own fon, after he has been deserted without just cause by his parents, or by either of them, if one be dead, is called a son rejected.

172. A fon, whom the daughter of any man privately brings forth in the house of her father, if the afterwards marry her lover, is described as a son begotten on an unmarried

girl.

173. 'If a pregnant young woman marry, 'whether her pregnancy be known or unknown,

* the male child in her womb belongs to the

bridegroom, and is called a fon received with

his bride.

174. He is called a fon bought, whom a

man, for the fake of having a fon to perform his

· obsequies, purchases from his father and mo-

' ther, whether the boy be equal or unequal to

' himself in good qualities, for in class all adopted

. Sons must be equal.

175. 'He, whom a woman, either forsaken

by her lord or a widow, conceived by a fecond

' husband, whom she took by her own desire,

though against law, is called the son of a wo-

' man twice married:

176. 'If, on her second marriage, she be still

a virgin, or if she left her husband under the

age of puberty and return to him at his full

age, she must again perform the nuptial cere-

" mony, either with her second, or her young and

. deserted, husband.

177. 'He, who has lost his parents, or been

' abandoned by them without just cause, and

offers himself to a man as his fon, is called a

fon felfgiven.

178. 'A fon, begotten through lust on a Sú-

a dra by a man of the priestly class, is even as

a corpie, though alive, and is thence called in

s law a living corple:

179. 'But a fon, begotten by a man of the

fervile class on his female flave, or on the fe-

male flave of his male flave, may take a

fhare of the heritage, if permitted by the other

fons: thus is the law established.

180. 'These eleven sons (the son of the wife,

and the rest as enumerated) are allowed by

wife legislators to be substitutes in order for

fons of the body, for the fake of preventing a

failure of obsequies;

181. 'Though fuch, as are called fons for

that purpose, but were produced from the

* manhood of others, belong in truth to the fa-

ther, from whose manhood they severally

fprang, and to no other, except by a just siction

of law.

182. 'IF, among several brothers of the

whole blood, one have a fon born, Menu

pronounces them all fathers of a male child

by means of that fon; fo that, if fuch nephew

would be the heir, the uncles have no power to

adopt sons:

183. 'Thus if, among all the wives of the

fame husband, one bring forth a male child,

MENU has declared them all, by means of

that fon, to be mothers of male issue.

184. On failure of the best, and of the next

best, among those twelve sons, let the inferiour

in order take the heritage; but, if there be

many of equal rank, let all be sharers of the

estate.

185. Not brothers, nor parents, but fons,

" if living, or their male issue, are heirs to the de-

ceased, but of him, who leaves no son, nor. a

wife, nor a daughter, the father shall take the inheritance; and, if he leave neither father, nor " mother, the brothers.

186. To three ancestors must water be given at their obsequies; for three (the father, his father, and the paternal grandfather) is the fu-" neral cake ordained: the fourth in descent is the giver of oblations to them, and their heir, if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake.

- 187. 'To the nearest fapinda, male or female, after him in the third degree, the inheritance " next belongs; then, on failure of fapindas and of their iffue, the famanodaca, or distant kins-" man, shall be the heir; or the spiritual preceptor, or the pupil, or the fellowstudent, of the « deceased:
- 188. On failure of all those, the lawful heirs are such Brahmens, as have read the three Védas, as are pure in body and mind, as have fubdued their passions; and they must ' consequently offer the cake: thus the rites of obsequies cannot fail.
- 189. The property of a Brahmen shall never be taken as an escheat by the king: this is a fixed law: but the wealth of the other classes, on failure of all heirs, the king may take.

190. If the widow of a man, who died

- ' without a fon, raise up a son to him by one of
- his kinsmen, let her deliver to that son, at his
- 'full age, the collected estate of the deceased, whatever it be.
- 191. If two fons, begotten by two successive
- 'husbands, who are both dead, contend for their
- ' property, then in the hands of their mother,
- 'let each take, exclusively of the other, his own
- ' father's estate.
- 192. 'On the death of the mother, let all
- the uterine brothers, and the uterine fisters, if
- ' unmarried, equally divide the maternal estate:
- each married fifter shall have a fourth part of a
- · brother's allotment.
 - 193. Even to the daughters of those
- daughters, it is fit, that fomething should be
- ' given, from the affets of their maternal grand-
- ' mother, on the score of natural affection.
 - 194. 'WHAT was given before the nuptial
- ' fire, what was given on the bridal procession,
- what was given in token of love, and what
- was received from a brother, a mother, or a
- father, are considered as the sixfold separate
- * property of a married woman:
 - 195. What she received after marriage
- from the family of her husband, and what
- ' her affectionate lord may have given her, shall
- be inherited, even if she die in his lifetime, by
- 4 her children.

196. 'It is ordained, that the property of a woman, married by the ceremonies called

Brábma, Daiva, Arsha, Gándharva, or Prá-

' jápatya, shall go to her husband, if she die

without iffue.

197. But her wealth given on the marriage * called Asura, or on either of the two others, is

ordained, on her death without iffue, to be-

come the property of her father and mother.

198. 'If a widow, whose husband had other

e wives of different classes, shall have received wealth at any time as a gift from her father.

and shall die without issue, it shall go to the

daughter of the Brahmani wife, or to the issue of that daughter.

199. A woman should never make a hoard

from the goods of her kindred, which are

common to ber and many; or even from the

' property of her lord, without his affent.

200. Such ornamental apparel, as women

wear during the lives of their husbands, the

heirs of those husbands shall not divide among

themselves: they, who divide it among them-

6 felves, fall deep into fin.

201. 'Eunuchs and outcasts, persons born

blind or deaf, madmen, idiots, the dumb, and

4 fuch as have loft the use of a limb, are excluded

from a share of the heritage;

202 But it is just, that the heir, who

- knows his duty, should give all of them food and raiment for life without stint, according to
- the best of his power: he, who gives them
- 'nothing, finks affuredly to a region of punish-
- 203. 'If the eunuch and the rest should at any time desire to marry, and if the wife of the
- " eunuch should raise up a son to him by a man le" gally appointed, that son and the issue of such,
- as have children, shall be capable of inheriting.
- 204. 'After the death of the father, if the
- eldest brother acquire wealth by his own efforts
- before partition, a share of that acquisition shall go to the younger brothers, if they have made
- 'a due progress in learning;
 - 205. 'And if all of them, being unlearned,
- acquire property before partition by their own
- ' labour, there shall be an equal division of that 'property without regard to the first born; for it
- was not the wealth of their father: this rule is
- clearly fettled.
- 206. Wealth, however, acquired by learn-
- 'ing, belongs exclusively to any one of them,
 'who acquired it; so does any thing given by a
- 'friend, received on account of marriage, or
- * presented as a mark of respect to a guest.
- 207. 'If any one of the brethren has a com-'petence from his own occupation, and wants
- on not the property of his father, he may debar

himself from his own share, some trifle being 'given him as a consideration, to prevent future · Strife.

208. 'What a brother has acquired by labour or skill, without using the patrimony, he

fhall not give up without his affent; for it was

gained by his own exertion:

209. 'And if a fon, by his own efforts, recover a debt or property unjustly detained, which

could not be recovered before by his father, he

' shall not, unless by his free will, put it into

parcenary with his brethren, fince in fact it

was acquired by himself.

210. 'IF brethren, once divided and living e again together as parceners, make a fecond partition, the shares must in that case be ' equal; and the first born shall have no right of deduction.

211. 'Should the eldest or youngest of seve-" ral brothers be deprived of his share by a civil e death on his entrance into the fourth order,

or should any one of them die, his vested inter-

eft in a share shall not wholly be lost;

212. 'But, if he leave neither fon, nor wife, " nor daughter, nor father, nor mother, his uter-

ine brothers and fifters, and fuch brothers as

were reunited after a separation, shall assemble and divide his share equally.

213. 'Any eldest brother, who from avarice ' shall defraud his younger brother, shall forfeit * the bonours of his primogeniture, be deprived

f of his own share, and pay a fine to the king.

214. 'All these brothers, who are addicted

to any vice, lose their title to the inheritance:

the first born shall not appropriate it to him-

felf, but shall give shares to the youngest, if

they be not vitious.

215. 'If, among undivided brethren living with their father, there be a common exertion for common gain, the father shall never make an unequal division among them, when they

divide their families.

216. 'A fon, born after a division in the stifetime of his father, shall alone inherit the patrimony, or shall have a share of it with the divided brethren, if they return and unite themselves with him.

217. OF a fon, dying childless and leaving. no widow, the father and mother shall take the estate; and, the mother also being dead, the paternal grandfather and grandmother shall take the heritage on failure of brothers and nephews.

218. 'When all the debts and wealth have been justly distributed according to law, any property, that may afterwards be discovered, fhall be subject to a similar distribution.

219. Apparel, carriages, or riding horses, and ornaments of ordinary value, which any of the heirs had used by consent before partition,

'dressed rice, water in a well or cistern, female staves, family priests, or spiritual counsellors, and pasture ground for cattle, the wise have

6 declared indivisible, and still to be used as be-

220. 'Thus have the laws of inheritance, and the rule for the conduct of fons (whether the fon of the wife or others) been expounded to you in order: learn at prefent the law concerning games of chance.

221. 'GAMING, either with inanimate or with animated things, let the king exclude wholly from his realm: both those modes of play cause destruction to princes.

222. 'Such play with dice and the like, or by matches between rams and cocks, amounts to open theft; and the king must ever be vigilant in suppressing both modes of play:

223. Gaming with lifeless things is known among men by the name of dyúta; but samábwaya signifies a match between living creatures.

224. 'Let the king punish corporally at discretion both the gamester and the keeper of a gaming house, whether they play with inanimate or animated things: and men of the service class, who wear the string and other marks of the twiceborn.

225. 'Gamesters, publick dancers and fing-

- ers, revilers of scripture, open hereticks, men
- 'who perform not the duties of their feveral
- classes, and sellers of spirituous liquor, let him
- instantly banish from the town:
 - 226. 'Those wretches, lurking like unseen
- thieves in the dominion of a prince, conti-
- ' nually harass his good subjects with their viti-
- ous conduct.
- 227. 'Even in a former creation was this
- "vice of gaming found a great provoker of en-
- ' mity; let no sensible man, therefore, addict
- ' himself to play even for his amusement:
 - 228. 'On the man addicted to it, either pri-
- 'vately or openly, let punishment be inflicted
- ' at the discretion of the king.
- 229. 'A MAN of the military, commercial,
- or fervile class, who cannot pay a fine, shall
- discharge the debt by his labour: a priest shall
- discharge it by little and little.
- 230. 'For women, children, persons of crazy
- intellect, the old, the poor, and the infirm,
- the king shall order punishment with a small
- whip, a twig, or a rope.
 - 231. 'THOSE ministers, who are employed
- ' in publick affairs, and, inflamed by the blaze
- of wealth, mar the business of any person
- concerned, let the king strip of all their pro-
 - 232. 'Such, as forge royal edicts, cause dis-

- fenfions among the great ministers, or kill
- women, priefts, or children, let the king put
- 6 to death; and fuch, as adhere to his enemies.
- 233. Whatever business has at any time
- been transacted conformably to law, let him
- s confider as finally fettled, and refuse to unseravel:
- 234. But whatever bufiness has been con-
- * cluded illegally by his ministers or by a judge,
- * let the king himself reexamine; and let him
- fine them each a thousand panas.
- 235. 'The flayer of a priest, a foldier or
- * merchant drinking arak, or a prieft drinking
- arak, mead, or rum, he, who steals the gold of
- a priest, and he, who violates the bed of his
- * natural or Spiritual father, are all to be con-
- ' fidered respectively as offenders in the highest
- degree, except these, whose crimes are not sit to
- * be named:
- 236. On fuch of those four, as have not
- 6 actually performed an expiation, let the king
- f legally inflict corporal punishment, together
- with a fine.
- 237. For violating the paternal bed, let the
- * mark of a female part be impressed on the fore-
- . head with hot iron; for drinking spirits, a vint-
- 'ner's flag; for stealing facred gold, a dog's
- foot; for murdering a priest, the figure of a
- * headless corpse:

- 238. 'With none to eat with them, with onne to facrifice with them, with none to read with them, with none to be allied by marriage to them, abject and excluded from all focial duties, let them wander over this earth:
- 239. 'Branded with *indelible* marks, they 'shall be deserted by their paternal and mater'nal relations, treated by none with affection,
 'received by none with respect: such is the or-
- dinance of MENU.
- 240. 'Criminals of all the classes, having 'performed an expiation, as ordained by law, 'shall not be marked on the forehead, but condemned to pay the highest fine:
- 241. 'For crimes by a priest, who had a 'good character before his offence, the middle 'fine shall be set on him; or, if his crime was 'premeditated, he shall be banished from the 'realm, taking with him his effects and his family;
- 242. But men of the other classes, who have committed those crimes, though without premeditation, shall be stripped of all their possible fessions; and, if their offence was premeditated, shall be corporally, or even capitally, punished, according to circumstances.
- 243. 'LET no virtuous prince appropriate the wealth of a criminal in the highest degree;

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f for he, who appropriates it through covetouff nefs. is contaminated with the fame guilt:

244. 'Having thrown such a fine into the waters, let him offer it to VARUNA; or let

him bestow it on some priest of eminent learn-

ing in the scriptures:

245. 'VARUNA is the lord of punishment;

he holds a rod even over kings; and a prieft,

who has gone through the whole Véda, is

fequal to a fovereign of all the world.

246. 'Where the king abstains from receiv-

sing to his own use the wealth of fuch offenders,

there children are born in due feafon and en-

' joy long lives;

247. 'There the grain of husbandmen rifes

abundantly, as it was respectively sown; there

' no younglings die, nor is one deformed ani-

e mal born.

248. 'SHOULD a man of the basest class,

with preconceived malice, give pain to Brah-

mens, let the prince corporally punish him by

' various modes, that may raife terrour.

249. 'A king is pronounced equally unjust

in releafing the man, who deferves punish-

ment, and in punishing the man, who de-

ferves it not: he is just, who always inflicts

the punishment ordained by law.

250. 'These established rules for administer-

fing justice, between two litigant parties, have

- been propounded at length under eighteen heads.
- 251. Thus fully performing all duties required by law, let a king feek with justice to
 possess regions yet unpossessed, and, when
 they are in his possession, let him govern them
 well.
- 252. 'His realm being completely arranged and his fortresses amply provided, let him ever apply the most diligent care to eradicate bad men resembling thorny weeds, as the law directs.
- 253. By protesting such as live virtuously, and by rooting up such as live wickedly, those kings, whose hearts are intent on the security of their people, shall rise to heaven.
- 254. 'Of that prince, who takes a revenue, 'without restraining rogues, the dominions are thrown into disorder, and himself shall be pre-cluded from a celestial abode;
- 255. But of him, whose realm, by the firength of his arm, is defended and free from terrour, the dominions continually flourish, like trees duly watered.
- 256. LET the king, whose emissaries are his eyes, discern well the two forts of rogues, the open and the concealed, who deprive other men of their wealth:
 - 257. Open rogues are they, who fubfift by

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- ' cheating in various marketable commodities;
- and concealed rogues are they, who steal and
- ' rob in forests and the like secret places.
- 258. 'Receivers of bribes, extorters of mo-
- 'ney by threats, debasers of metals, gamesters, fortunetellers, imposters, and professors of pal-
- " mistry;
 - 259. 'Elephant breakers and quacks, not per-
- forming what they engage to perform, pre-
- ' tended artifts, and fubtil harlots;
 - 260. These and the like thorny weeds,
- overspreading the world, let the king discover
- with a quick fight, and others, who act ill in
- 'fecret; worthless men, yet bearing the out-
- ' ward figns of the worthy.
 - 261. 'Having detected them, by the means
- of trufty persons disguised, who pretend to
- ' have the fame occupation with them, and of
- ' fpies placed in feveral flations, let him bring
- ' them by artifice into his power:
 - 262. 'Then, having fully proclaimed their
- * respective criminal acts, let the king inflict
- ' punishment legally, according to the crimes
- 'proved;
- 263. 'Since, without certain punishment, it
- 'is impossible to restrain the delinquency of
- 6 fcoundrels with depraved fouls, who fecretly
- " prowl over this earth.
 - 264. 'Muchfrequented places, cifterns of

'water, bake houses, the lodgings of harlots,

taverns and victualling shops, squares where

four ways meet, large well known trees,

affemblies, and publick spectacles;

265. Old courtyards, thickets, the houses

of artists, empty mansions, groves, and gar-

dens;

266. 'These and the like places let the king 'guard, for the prevention of robberies, with

foldiers, both stationary and patroling, as well

as with fecret watchmen.

267. By the means of able spies, once

'thieves but reformed, who, well knowing the

'various machinations of rogues, affociate with

' them and follow them, let the king detect and

draw them forth:

268. On pretexts of dainty food and gratifications, or of feeing fome wife prieft, who

could ensure their success, or on pretence of

' mock battles and the like feats of strength, let

' the spies procure an affembly of those men.

269. 'Such as refuse to go forth on those oc-

casions, deterred by former punishments, which

' the king had inflicted, let him feize by force,

' and put to death, on proof of their guilt, with

'their friends and kinfmen, paternal and ma-

'ternal, if proved to be their confederates.

270. 'Let not a just prince kill a man con-

'victed of simple theft, unless taken with the

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- ' mainer or with implements of robbery; but
- ' any thief, taken with the mainer, or with
- ' fuch implements, let him destroy without he-
- ' fitation;
- 271. 'And let him flay all those, who give robbers food in towns, or supply them with
- ' implements, or afford them shelter.
 - 272. 'Should those men, who are appointed
- ' to guard any districts, or those of the vicinity,
- ' who were employed for that purpose, be neu-
- ' tral in attacks by robbers and inactive in feiz-
- 'ing them, let him instantly punish them as
- thieves.
- 273. 'Him, who lives apparently by the
- ' rules of his class, but really departs from those
- ' rules, let the king severely punish by fine, as a
- " wretch, who violates his duty.
 - 274. 'They, who give no affistance on the
- ' plundering of a town, on the forcible breaking
- of a dike, or on feeing a robbery on the high-
- way, shall be banished with their cattle and
- ' utenfils.
 - 275. 'Men, who rob the king's treasure, or
- obstinately oppose his commands, let him de-
- ftroy by various modes of just punishment;
- f and those, who encourage his enemies.
 - 276. 'Of robbers, who break a wall or
- s partition, and commit theft in the night, let

the prince order the hands to be lopped off,
and themselves to be fixed on a sharp stake.

277. 'Two fingers of a cutpurse, the thumb

- and the index, let him cause to be amputated -
- on his first conviction; on the second, one
- hand and one foot; on the third, he shall suffer
- death.
- 278. 'Such, as give thieves fire, fuch as give them food, such as give them arms and apart'ments, and such as knowingly receive a thing folen, let the king punish as be would punish a thief.
- 279. The breaker of a dam to secure a pool, let him punish by long immersion under water or by keen corporal suffering; or the offender shall repair it, but must pay the highest must.
- 280. 'Those, who break open the treasury, or the arsenal, or the temple of a deity, and those, who carry off royal elephants, horses, or cars, let him without hesitation destroy.
- 281. 'He, who shall take away the water of an ancient pool, or shall obstruct a watercourse, must be condemned to pay the lowest usual americament.
- 282. 'He, who shall drop his ordure on the king's highway, except in case of necessity, shall pay two panas and immediately remove the silth;

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283. But a person in urgent necessity, a very old man, a pregnant woman, and a child,

only deserve reproof, and shall clean the place

' themselves: that is a settled rule.

284. ALL physicians and surgeons acting unskilfully in their several professions, must

* pay for injury to brute animals the lowest, but

for injury to human creatures the middle,

amercement.

285. 'THE breaker of a footbridge, of a pub-

e lick flag, of a palifade, and of idols made of

'clay, shall repair what he has broken, and pay

'a mulct of five hundred panas.

286. 'For mixing impure with pure com-

modities, for piercing fine gems, as diamonds

or rubies, and for boring pearls or inferiour

' gems improperly, the fine is the lowest of the

three; but damages must always be paid.

287. 'THE man, who shall deal unjustly

with purchasers at a fair price by delivering

'goods of less value, or shall fell at a high price goods of ordinary value, shall pay according to

goods of oramary value, shall pay according to

"circumstances, the lowest or the middle amercement.

288. LET the king place all prisons near a

publick road, where offenders may be feen

wretched or disfigured.

289. HIM, who breaks down a publick

wall, him, who fills up a publick ditch, him,

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who throws down a publick gate, the king shall

' fpeedily banish.

290. For all facrifices to destroy innocent

men, the punishment is a fine of two hundred

panas; and for machinations with poisonous

roots, and for the various charms and witch-

eries intended to kill, by persons not effecting

their purpose.

291. 'THE feller of bad grain for good, or of

good feed placed at the top of the bag, to con-

ceal the bad below, and the destroyer of known

'landmarks, must fusser such corporal punish-

ment as will disfigure them;

292. 'But the most pernicious of all de-

ceivers is a goldsmith, who commits frauds:

the king shall order him to be cut piecemeal

with razors.

293. FOR stealing implements of husbandry, weapons, and prepared medicines, let

the king award punishment according to the

time and according to their use.

294. THE king, and his council, his me-

tropolis, his realm, his treasure, and his army,

together with his ally, are the feven members

of his kingdom; whence it is called Septánga:

295. Among those seven members of a

kingdom, let him confider the ruin of the

i first, and so forth in order, as the greatest ca-

flamity;

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296. 'Yet, in a fevenparted kingdom here

below, there is no supremacy among the several parts, from any preeminence in useful

qualities: but all the parts must reciprocally

fupport each other, like the three staves of a

6 holy mendicant:

297. In these and those acts, indeed, this and that member may be distinguished; and

the member, by which any affair is trans-

* acted, has the preeminence in that particular affair.

298. WHEN the king employs emissaries,

when he exerts power, when he regulates publick business, let him invariably know both

" his own strength and that of his enemy,

299. With all their several distresses and

vices: let him then begin his operations, hav-

ing maturely confidered the greater and less

importance of particular acts:

300. 'Let him, though frequently disappointed,

renew his operations, how fatigued foever,

again and again: fince fortune always attends

the man, who, having begun well, strenuously

renews his efforts.

301. ALL the ages, called Satya, Trétá,

Dwapara, and Cali, depend on the conduct of

the king; who is declared in turn to represent

each of those ages:

302. 'Sleeping, he is the Cali age; waking

the Dwapara; exerting himself in action, the

· Trétá; living virtuously, the Satya.

303. Of Indra, of Su'RYA, of PAVANA,

of YAMA, of VARUNA, of CHANDRA, of

· AGNI, and of PRIT'HIVI, let the king emulate

the power and attributes.

304. As INDRA sheds plentiful showers

during the four rainy months, thus let him,

acting like the regent of clouds, rain just gra-

' tifications over his kingdom:

305. ' As Su'RYA with strong rays draws up

the water during eight months, thus let him,

· performing the function of the fun, gradually

draw from his realm the legal revenue:

306. 'As PAVANA, when he moves, per-

vades all creatures, thus let him, imitating

the regent of wind, pervade all places by his

concealed emissaries:

307. 'As YAMA, at the appointed time,

punishes friends and foes, or those who revere,

and those who contemn, him, thus let the king,

refembling the judge of departed spirits,

· punish offending subjects:

308. ' As VARUNA most assuredly binds the

guilty in fatal cords, thus let him, represent-

'ing the genius of water, keep offenders in

close confinement:

309. 'When the people are no less delighted

on feeing the king, than on feeing the full

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6 moon, he appears in the character of Chan-6 DRA:

310. 'Against criminals let him ever be ar-

dent in wrath, let him be splendid in glory,

elet him confume wicked ministers, thus

emulating the functions of AGNI, regent of fire.

311. 'As PRĭT'HIVì supports all creatures

equally, thus a king, fustaining all subjects,

f resembles in his office the goddess of earth.

312. 'Engaged in these duties and in others,

with continual activity, let the king above all

'things restrain robbers, both in his own terri-

6 tories and in those of other princes, from which

they come, or in which they seek refuge.

313. 'LET him not, although in the great-

est distress for money, provoke Brahmens to

anger by taking their property; for they, once

enraged, could immediately by facrifices and

' imprecations destroy him with his troops, ele-

f phants, horses and cars.

314. Who, without perishing, could pro-

woke those holy men, by whom, that is, by

' whose ancestors, under BRAHMA', the allde-

' vouring fire was created, the fea with waters

6 not drinkable, and the moon with its wane

and increase?

315. What prince could gain wealth by oppressing those, who, if angry, could frame

- other worlds and regents of worlds, could give
- being to new gods and mortals?
 - 316. 'What man, desirous of life, would
- 'injure those, by the aid of whom, that is, by
- · whose oblations, worlds and gods perpetually
- fubfift; those who are rich in the learning of
- the Véda?
 - 317. A Brahmen, whether learned or igno-
- rant, is a powerful divinity; even as fire is a
- powerful divinity, whether confecrated or
- popular.
 - 318. Even in places for burning the dead,
- the bright fire is undefiled; and, when pre-
- fented with clarified butter at fubsequent facri-
- fices, blazes again with extreme splendour:
- 319. 'Thus, although Brahmens employ
- themselves in all forts of mean occupation,
- they must invariably be honoured; for they
- are fomething transcendently divine.
 - 320. Of a military man, who raises his
- arm violently on all occasions against the
- priestly class, the priest himself shall be the
- 'chastiser; since the soldier originally proceed-
- ed from the Brahmen.
 - 321. From the waters arose fire; from the
- e priest, the soldier; from stone, iron: their all-
- f penetrating force is ineffectual in the places,
- whence they respectively sprang.
- 322. The military class cannot prosper

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- without the sacerdotal, nor can the sacerdotal
- be raised without the military: both classes, by
- cordial union, are exalted in this world and in the next.
 - 323. 'SHOULD the king be near his end through
- fome incurable disease, he must bestow on the
- opicits all his riches accumulated from legal
- fines; and, having duly committed his king-
- dom to his fon, let him feek death in battle, or,
- if there be no war, by abstaining from food.
 - 324. 'Thus conducting himself, and ever
- firm in discharging his royal duties, let the king
- employ all his ministers in acts beneficial to his
- people.
 - 325. 'These rules for the conduct of a mi-
- ' litary man having been propounded, let man-
- kind next hear the rules for the commercial
- and fervile classes in due order.
 - 326. LET the Vaifya, having been girt with
- his proper facrificial thread, and having mar-
- fried an equal wife, be always attentive to his
- business of agriculture and trade, and to that of
- * keeping cattle;
 - 327. Since the lord of created beings, hav-
- 4 ing formed herd, and flocks, intrusted them to
- the care of the Vaifya, while he intrusted the
- whole human species to the Brahmen and the
- " Cshatriya:
 - 328. 'Never must a Vaisya be disposed to say,

"I keep no cattle;" nor, he being willing to

keep them, must they by any means be kept

by men of another class.

329. Of gems, pearls, and coral, of iron,

of woven cloth, of perfumes and of liquids, let him well know the prices both high and low:

330. Let him be skilled likewise in the time

and manner of sowing seeds, and in the bad or

good qualities of land; let him also perfectly

know th ecorrect modes of measuring and

s weighing,

331. The excellence or defects of commo-

dities, the advantages and disadvantages of

different regions, the probable gain or loss on

vendible goods, and the means of breeding

cattle with large augmentation:

332. Let him know the just wages of fer-

vants, the various dialects of men, the best

way of keeping goods, and whatever else be-

· longs to purchase and sale.

333. Let him apply the most vigilant care

to augment his wealth by performing his duty;

and, with great folicitude, let him give nou-

rishment to all sentient creatures.

334. SERVILE attendance on Brahmens

learned in the Vėda, chiefly on fuch as keep

house and are famed for virtue, is of itself the

highest duty of a Súdra, and leads him to

future beatitude:

335. Pure in body and mind, humbly ferving the three higher classes, mild in speech, never

arrogant, ever seeking refuge in Brahmens

principally, he may attain the most eminent

class in another transmigration.

336. This clear fystem of duties has been

promulgated for the four classes, when they

are not in distress for subsistence; now learn

in order their feveral duties in times of neces-

s fity.'

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CHAPTER THE TENTH.

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On the mixed Classes; and on Times of Distress.

- 1. LET the three twiceborn classes, remain-
- ing firm in their feveral duties, carefully read
- the Veda; but a Brahmen must explain it to
- them, not a man of the other two classes; this
- is an established rule.
 - 2. 4. The Brahmen must know the means of
- · fubfistence ordained by law for all the classes,
- and must declare them to the rest: let him-
- felf likewise act in conformity to law.
 - 3. From priority of birth, from superiority
- of origin, from a more exact knowledge of
- fc.ripture, and from a distinction in the sacri-
- ficial thread, the Brahmen is the lord of all
- classes.
 - 4. 'The three twiceborn classes are the sa-
- cerdotal, the military, and the commercial;
- but the fourth, or fervile, is onceborn, that is,
- has no second birth from the gayatri, and wears
- " no thread: nor is there a fifth pure class.
- 5. In all classes they, and they only, who
- · are born, in a direct order, of wives equal in

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- f class and virgins at the time of marriage, are
- * to be confidered as the same in class with their * fathers:
- 6. Sons, begotten by twiceborn men, on
- women of the class next immediately below
- 6 them, wife legislators call similar, not the same,
- in class with their parents, because they are
- 6 degraded, to a middle rank between both, by the
- s lowness of their mothers: they are named in
- order, Múrdhábhishicta, Máhishya, and Ca-
- erana, or Cáyast'ha; and their several employ-
- ' ments are teaching military exercises; musick,
- * astronomy, and keeping herds; and attendance on * princes.
 - 7. 'Such is the primeval rule for the fons
- of women one degree lower than their husbands:
- for the fons of women two or three degrees
- flower, let this rule of law be known.
 - 8. ' From a Brábmen, on a wife of the Vaifya
- class, is born a fon called Ambasht'ha, or
- " Vaidya, on a Súdra wife a Nisháda, named
- · also Párasava:
 - 9. ' From a Cshatriya, on a wife of the Súdra
- class, springs a creature, called Ugra, with a
- nature partly warlike and partly fervile, fero-
- cious in his manners, cruel in his acts.
 - 10. 'The sons of a Brahmen by women of
- three lower classes, of a Chatriya by women of
- two, and of a Vaifya by one lower class, are

- called apasadáh, or degraded below their fathers.
 - 11. 'From a Cshatriya, by a Brahment wife,
- fprings a Súta by birth; from a Vaifya, by a
- f military or facerdotal wife, spring a Mágadha
- f and a Vaidéha.
- 12. From a Súdra, on women of the com-
- e mercial, military, and priestly classes, are born
- fons of a mixed breed, called A'yogava, Chat-
- tri, and Chandala, the lowest of mortals.
 - 13. 'As the Ambasht' ba and Ugra, born in
- a direct order with one class between those of
- * their parents, are confidered in law, so are the
- · Chattri and the Vaidéha, born in an inverse
- order with one intermediate class; and all four
- * may be touched without impurity.
 - 14. 'Those fons of the twiceborn, who are
- begotten on women without an interval (An-
- tara) between the classes mentioned in order,
- the wife called Anantaras, giving them a di-
- finet name from the lower degree of their
- mothers.
- 15. 'From a Bráhmen, by a girl of the Ugra
- tribe, is born an A'vrita; by one of the Am-
- bast'ha tribe, an Abhira; by one of the A'yô-
- ' gava tribe, a Dhigvana.
 - 16. 'The A'yógava, the Cshattri, and the
- · Chandála, the lowest of men, spring from a
- Sudra in an inverse order of the classes, and

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are, therefore, all three excluded from the per-

formance of obsequies to their ancestors:

17. 'From a Vaifya the Magadha and Vaide-

' ha, from a Cshatriya the Súta only, are born

'in an inverse order; and they are three other

' fons excluded from funeral rites to their fathers.

18. 'The fon of a Nisháda, by a woman of

the Súdra class, is by tribe a Puccasa; but the

fon of a Súdra by a Nishádi woman, is named

· Cuccutaca.

19. 'One, born of a Cshattri by an Ugra, is

called Swapáca; and one, begotten by a Vaidé-

' ha on an Ambashthi wife, is called Véna.

20. 'Those, whom the twiceborn beget on

women of equal classes, but who perform not

the proper ceremonies of assuming the thread,

and the like, people denominate Vrátyas, or

excluded from the gáyatri.

21. 'From such an outcast Brahmen springs

a fon of a finful nature, who in different coun-

' tries is named a Bhurjacantaca, an A'vantya,

· a Vátadhána, a Pushpadha, and a Saic'ha:

22. ' From such an outcast Cshatriya comes

a fon called a J'halla, a Malla, a Nich'hivi, a

· Nata, a Carana, a C'hafa, and a Dravira:

23. 'From such an outcast Vaisya is born a

fon called Sudhanwan, Chárya, Cárusha, Vi-

' janman, Maitra, and Satwata.

24. By intermixtures of the classes, by their

- marriages with women who ought not to be
- married, and by their omission of prescribed
- duties, impure classes have been formed.
 - 25. Those men of mingled births, who
- * were born in the inverse order of classes, and
- who intermarry among themselves, I will now
- 4 compendiously describe.
 - 26. 'The Súta, the Vaidéha, and the Chan-
- * dála, that lowest of mortals, the Mágadha, the
- · Cshattri by tribe, and the Ayogava,
 - 27. 'These six beget similar sons on women
- of their own classes, or on women of the same
- class with their mothers; and they produce
- the like from women of the two highest
- classes, and of the lowest:
 - 28. 'As a twiceborn fon may fpring from a
- Brahmen by women of two classes out of
- three, a similar son, when there is no interval.
- and an equal son from a woman of his own
- class, it is thus in the case of the low tribes
- in order.
- 29. 'Those six beget, on women of their
- own tribes, reciprocally, very many despica-
- ble and abject races even more foul than their
- 6 begetters.
 - 30. 'Even as a Súdra begets, on a Brahmen's
- woman, a fon more vile than himself, thus
- 'any other low man begets, on woman of the
- four classes, a fon yet lower.

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- 31. The fix low classes, marrying inversely,
- beget fifteen yet lower tribes, the base pro-
- ducing still baser; and in a direct order they
- · produce fifteen more.
 - 32. A Dafyu, or outcast of any pure class,
- begets on an Ayogavì woman a Sairindhra,
- who should know how to attend and to dress
- ' his master; though not a slave, he must live
- by flavish work, and may also gain subsistence
- by catching wild beafts in toils:
 - 33. ' A Vaidéha begets on her a sweetvoiced
- ' Maitréyaca, who, ringing a bell at the ap-
- pearance of dawn, continually praises great
- men:
- 34. ' A Nisháda begets on her a Márgava,
- or Dása, who subsists by his labour in boats,
- and is named Caiverta by those, who dwell in
- " A'ryáverta, or the land of the venerable.
- 35. 'Those three of a base tribe are severally
- ' begotten on A'yogavi women, who wear the
- clothes of the deceased and eat reprehensible
- food.
 - 36. From a Nishada springs by a woman of
- the Vaidéha tribe, a Cárávara, who cuts lea-
- ther, and from a Vaidéha spring by women of
- · the Caravara and Nishada casts, an Andhra
- and a Méda, who must live without the town.
 - 37. 'From a Chandála, by a Vaidéhì woman,
- comes a Pándusópáca, who works with cane

and reeds; and from a Nishada, an Ahindica;

who acts as a jailor.

38. 'From a Chandála, by a Puccasi woman,

'is born a Sópáca, who lives by punishing crimi-

* nals condemned by the king, a finful wretch

ever despised by the virtuous.

39. ' A Nisbadì woman, by a Chandala, pro-

duces a fon called Antyavafayin, employed in

' places for burning the dead, contemned even

by the contemptible.

40. 'These, among various mixed classes,

have been described by their several fathers

and mothers; and, whether concealed or open,

they may be known by their occupations.

41. Six fons, three begotten on women of

the fame class, and three on women of lower

classes, must perform the duties of twiceborn

'men; but those, who are born in an inverse

order, and called lowborn, are equal, in respect

of duty, to mere Sudras.

42. By the force of extreme devotion and

of exalted fathers, all of them may rise in time

to high birth, as by the reverse they may fink

to a lower state, in every age among mortals

in this inferiour world.

43. 'The following races of Cshatriyas, by

their omiffion of holy rites and by feeing no

Brábmens, have gradually funk among men to

the lowest of the four classes:

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44. Paund'racas, Odras, and Draviras.;

* Cámbojas, Yavanas, and Sacas; Páradas,

· Pablavas, Chinas, Cirátas, Deradas, and

& C'hasas.

45. All those tribes of men, who sprang

from the mouth, the arm, the thigh, and the

foot of BRAHMA', but who became outcasts by

having neglected their duties, are called Dafyus,

or plunderers, whether they speak the language

of Mlechch' bas, or that of Aryas.

46. 'Those fons of the twiceborn, who are

' faid to be degraded, and who are confidered as

6 lowborn, shall subsist only by such employ-

ments, as the twiceborn despise.

47. 'Sútas must live by managing horses and

by driving cars; Ambasht' bas, by curing dif-

' orders; Vaidėhas, by waiting on women; Má-

' gadhas, by travelling with merchandize;

48. ' Nishadas, by catching fish; an Ayogava,

by the work of a carpenter; a Méda, an An-

dbra, and (the fons of a Brábmen by wives of

the Vaideba and Ugra classes, respectively called)

' a Chunchu and a Madgu, by flaying beafts of

" the forest;

49. ' A Cshattri, an Ugra, and a Puccasa,

by killing or confining fuch animals as live in

'holes: Dhiguanas, by felling leather; Vénas,

by striking musical instruments:

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50. Near large publick trees, in places for burning the dead, on mountains, and in

' groves, let those tribes dwell, generally known,

' and engaged in their feveral works.

51. 'The abode of a Chandala and a Swa-

· péca must be out of the town; they must not

'have the use of entire vessels; their sole wealth

must be dogs and asses:

52. 'Their clothes must be the mantles of the deceased; their dishes for food, broken pots; their ornaments, rusty iron; continually

' must they roam from place to place:

53. 'Let no man, who regards his duty re-'ligious and civil, hold any intercourse with 'them; let their transactions be confined to 'themselves, and their marriages only between 'equals:

54. 'Let food be given to them in pot-'sherds, but not by the hands of the giver; 'and let them not walk by night in cities or

towns:

55. 'By day they may walk about for the 'purpose of work, distinguished by the king's 'badges; and they shall carry out the corpse of 'every one, who dies without kindred: such 'is the fixed rule.

56. 'They shall always kill those, who are to be slain by the sentence of the law, and by the royal warrant; and let them take the

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clothes of the flain, their beds, and their oraments.

57. 'HIM, who was born of a finful mother, and consequently in a low class, but is not openly known, who, though worthless in truth, bears the femblance of a worthy man, let

' people discover by his acts:

58. 'Want of virtuous dignity, harshness of ' fpeech, cruelty, and habitual neglect of pre-' fcribed duties, betray in this world the fon of ' a criminal mother.

59. 'Whether a man of debased birth assume the character of his father or of his mother, he can at no time conceal his origin:

60. 'He, whose family had been exalted, but whose parents were criminal in marrying, has a base nature, according as the offence of

' bis mother was great or small.

61. In whatever country fuch men are ' born, as destroy the purity of the four classes, ' that country foon perishes together with the natives of it.

62. Defertion of life, without reward, for the fake of preferving a priest or a cow, a woman or a child, may cause the beatitude of

' those baseborn tribes.

63. Avoiding all injury to animated beings, veracity, abstinence from thest, and from unjust ' seizure of property, cleanliness, and command

over the bodily organs, form the compendious

' fystem of duty, which Menu has ordained for

the four classes.

64. 'SHOULD the tribe fprung from a Bráb-

men, by a Súdra woman, produce a succession of

children by the marriages of its women with

other Brabmens, the low tribe shall be raised

to the highest in the seventh generation.

65. 'As the fon of a Súdra may thus attain

the rank of a Bráhmen, and as the fon of a

· Bráhmen may fink to a level with Súdras, even

fo must it be with him, who springs from a

· Cshatriya; even so with him, who was born

of a Vaifya.

66. 'IF there be a doubt, as to the preference

between him, who was begotten by a Brábmen

' for his pleasure, but not in wedlock, on a Sudra

woman, and him, who was begotten by a

· Súdra on a Bráhmení,

67. 'Thus is it removed: he, who was be-

gotten by an exalted man on a base woman,

may by his good acts become respectable; but

he, who was begotten on an exalted woman

by a base man, must himself continue base:

68. 'Neither of the two (as the law is fixed)

' shall be girt with a facred string; not the for-

mer, because his mother was low; nor the

' fecond, because the order of the classes was in-

'verted.

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69. As good grain, fpringing from good foil, is in all respects excellent, thus a man,

fpringing from a respectable father by a respect-

' able mother, has a claim to the whole institu-

'tion of the twice born.

70. 'Some fages give a preference to the grain; others to the field; and others confider both field and grain; on this point the decision

follows:

71. 'Grain, cast into bad ground, wholly perishes, and a good field with no grain sown in it, is a mere heap of clods;

72. 'But fince, by the virtue of eminent fathers, even the fons of wild animals, as Rish-'yasringa, and others, have been transformed

into holy men revered and extolled, the pa-

" ternal fide, therefore, prevails.

73. BRAHMA' himself, having compared a Súdra, who performs the duties of the twice-born, with a twiceborn man, who does the

" acts of a Súdra, faid: "Those two are neither

"equal nor unequal," that is, they are neither equal in rank, nor unequal in bad conduct.

74. LET fuch Brahmens as are intent on the means of attaining the fupreme godhead, and firm in their own duties, completely perform in order, the fix following acts:

75. 'Reading the Védas, and teaching others to read them, facrificing, and affifting others to

' facrifice, giving to the poor, if themselves have

' enough, and accepting gifts from the virtuous, if

themselves are poor, are the fix prescribed acts

of the firstborn class;

76. 'But, among those six acts of a Bráhmen,

' three are his means of subfishence; affishing to

facrifice, teaching the Veaas, and receiving

' gifts from a purehanded giver.

77. 'Three acts of duty cease with the Bráb-

men, and belong not to the Cshatriya; teaching

the Védas, officiating at a facrifice, and, thirdly,

receiving presents;

78. 'Those three are also (by the fixed rule

of law) forbidden to the Vaifya; fince MENU,

the lord of all men, prescribed not those acts to

the two classes, military and commercial.

79. The means of subsistence, peculiar to

' the Cshatriya, are bearing arms, either held for

ftriking or missile; to the Vaisya, merchandize,

sattending on cattle, and agriculture: but with

' a view to the next life the duties of both are

* almsgiving, reading, facrificing.

80. Among the feveral occupations for gain-

ing a livelihood the most commendable respect-

· ively for the facerdotal, military, and mercan-

tile classes, are teaching the Véda, defending

the people, and commerce or keeping herds

and flocks.

81. 'Yet a Brahmen, unable to subsist by his

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futies just mentioned, may live by the duty of a foldier; for that is the next in rank.

82. 'If it be asked, how he must live, should

'he be unable to get a sussistence by either of

those employments; the answer is, he may

' fubfift as a mercantile man, applying himfelf

in person to tillage and attendance on cattle:

83. But a Bráhmen and a Cshatriya, obliged

to fubfift by the acts of a Vaifya, must avoid

' with care, if they can live by keeping herds, the

' business of tillage, which gives great pain to

'Sentient creatures, and is dependant on the la-

bour of others, as bulls and so forth.

84. 'Some are of opinion, that agriculture is

excellent; but it is a mode of subsistence,

which the benevolent greatly blame; for the

sironmouthed pieces of wood not only wound

the earth, but the creatures dwelling in it.

85. 'If, through want of a virtuous live-

blihood, they cannot follow laudable occupa-

'tions, they may then gain a competence of

wealth by felling commodities usually fold

by merchants, avoiding what ought to be

avoided:

86. 'They must avoid selling liquids of all

forts, dreffed grain, feeds of tila, stones, falt,

cattle and human creatures;

87. 'All woven cloth dyed red, cloth made

of sana, of cshumá bark, and of wool, even

'though not red; fruit, roots, and medicinal 'plants;

88. Water, iron, poison, fleshmeat, the moonplant, and perfumes of any fort; milk,

honey, buttermilk, clarified butter, oil of tila,

'wax, fugar, and blades of cus'a-grass;

89, 'All beasts of the forest, as deer and the 'like; ravenous beasts, birds, and fish; spi'rituous liquors, níli, or indigo, and lácshá,
'or lac; and all beasts with uncloven hoofs.

90. 'But the Brábmen husbandman may at 'pleasure sell pure tila seeds for the purpose of holy rites, if he keep them not long with a hope of more gain, and shall have produced them by his own culture:

91. 'If he apply feeds of tila to any purpose but food, anointing, and facred oblations, he shall be plunged, in the shape of a worm, together with his parents, into the ordure of dogs.

92. 'By felling fleshmeat, lácshá, or salt, a 'Bráhmen immediately sinks low; by selling

'milk three days, he falls to a level with a 'Sudra;

93. And by felling the other forbidden commodities with his own free will, he affumes

'in this world, after feven nights, the nature of 'a mere Vaifya.

94. Fluid things may, however, be bartered for other fluids, but not falt for any thing

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- sliquid; fo may dreffed grain for grain un-
- dreffed, and tila feeds for grain in the husk,
- equal weights or measures being given and taken.
- 95. A MILITARY man, in distress, may
- fublish by all these means, but at no time must
- he have recourse to the highest, or facerdotal,
- function.
 - 96. A man of the lowest class, who,
- through covetousness, lives by the acts of the
- highest, let the king strip of all his wealth and
- 'instantly banish:
 - 97. 'His own office, though defectively per-
- formed, is preferable to that of another,
- 4 though performed completely; for he, who
- " without necessity discharges the duties of an-
- other class, immediately forfeits his own.
 - 98. 'A MERCANTILE man, unable to subsist
- 6 by his own duties, may descend even to the
- fervile acts of a Súdra, taking care never to do
- what ought never to be done; but, when he
- 4 has gained a competence, let him depart from
- 6 fervice.
- 99. 'A MAN of the fourth class, not finding
- employment by waiting on the twiceborn,
- 'while his wife and fon are tormented with
- 4 hunger, may fubfift by handicrafts:
 - 100. 'Let him principally follow those me-
- f chanical occupations, as joinery and masonry, or

those various practical arts, as painting and

writing, by following which, he may ferve the

twiceborn,

101. 'SHOULD a Brahmen, afflicted and pin-

ing through want of food, choose rather to re-

' main fixed in the path of his own duty, than

to adopt the practice of Vaifyas, let him act in

this manner:

102. 'The Brahmen, having fallen into dif-

treis, may receive gifts from any person what-

ever; for by no facred rule can it be shown,

that absolute purity can be sullied.

103. 'From interpreting the Vėda, from offi-

ciating at facrifices, or from taking prefents, though in modes generally disapproved, no fin

is committed by priests in distress; for they are

pure as fire or water.

104. 'He, who receives food, when his life

s could not otherwise be sustained, from any

man whatever, is no more tainted by fin, than

the fubtil ether by mud:

105. 'AJI'GARTA, dying with hunger, was

s going to destroy his own fon (named S'UNAH-

· s'E'P'HA) by felling him for some cattle; yet he

was guilty of no crime, fince he only fought a

fremedy against famishing:

106. 'VA'MADE'VA, who well knew right

and wrong, was by no means rendered impure,

though desirous, when oppressed with hunger,

of eating the flesh of dogs for the preservation of his life:

107. 'BHARADWA'JA, eminent in devotion, when he and his fon were almost starved in a

dreary forest, accepted several cows from the

carpenter Vridhu:

108. 'Viswa'mitra too, than whom none

better knew the distinctions between virtue

and vice, refolved, when he was perishing with

hunger, to eat the haunch of a dog, which he

' had received from a Chandala.

109. 'Among the acts generally disapproved,

namely, accepting presents from low men, affist-

ing them to facrifice, and explaining the fcripture

to them, the receipt of presents is the meanest

in this world, and the most blamed in a Brák-

men after his present life;

110. Because affishing to facrifice and ex-

' plaining the scripture are two acts always per-

' formed for those, whose minds have been im-

sproved by the facred initiation; but gifts are

s also received from a servile man of the lowest

class.

111. 'The guilt, incurred by affifting low

"men to facrifice and by teaching them the

'fcripture, is removed by repetitions of the

' gáyatrì and oblations to fire; but that, incurred

by accepting gifts from them, is expiated only

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- by abandoning the gifts and by rigorous devotion.
 - 112. It were better for a Bráhmen, who could not maintain himself, to glean ears and
- grains after harvest from the field of any person
- whatever: gleaning whole ears would be better
- than accepting a prefent, and picking up fin-
- fgle grains would be still more laudable.
 - 113. ' Bráhmens, who keep house, and are in
- want of any metals except gold and filver, or of
- other articles for good uses, may ask the king
- for them, if he be of the military class; but a
- king, known to be avaricious and unwilling to
- e give, must not be solicited.
 - 114. 'The foremost, in order, of these things
- may be received more innocently than that,
- which follows it: a field untilled, a tilled field,
- cows, goats, sheep, precious metals or gems,
- new grain, dreffed grain.
- 115. THERE are seven virtuous means of
- * acquiring property; fuccession, occupancy or
- donation, and purchase or exchange, which are
- allowed to all classes; conquest, which is peculiar
- to the military class; lending at interest, hus-
- bandry or commerce, which belong to the mer-
- cantile class; and acceptance of presents, by the
- " sacerdotal class, from respectable men.
 - 116] 'Learning, except that contained in the

fcriptures, art, as mixing perfumes and the like, work for wages, menial fervice, attend-

ance on cattle, traffick, agriculture, content

with little, alms, and receiving high interest

on money, are ten modes of subsistence in times

6 of distress.

" mands it.

117. 'Neither a priest nor a military man, 'though distressed, must receive interest on loans; 'but each of them, if he please, may pay the 'small interest permitted by law, on borrowing 'for some pious use, to the sinful man, who de-

118. A MILITARY king, who takes even a fourth part of the crops of his realm at a time of urgent necessity, as of war or invasion, and protects his people to the utmost of his power,

commits no fin:

119. 'His peculiar duty is conquest, and he 'must not recede from battle; so that, while he 'defends by his arms the merchant and hus- 'bandman, he may levy the legal tax as the 'price of protection.

120. 'The tax on the mercantile class, which in times of prosperity must be only a twelfth part of their crops, and a sisteth of their personal prosits, may be an eighth of their crops in a time of distress, or a sixth, which is the medium, or even a fourth in great publick adversity; but a twentieth of their gains on money, and

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other moveables, is the highest tax: serving

6 men, artifans, and mechanicks must affift by

their labour, but at no time pay taxes.

121. 'IF a Sudra want a subsistence and

cannot attend a priest, he may serve a Csha-

triva; or, if he cannot wait on a foldier by birth,

he may gain his livelihood by ferving an opu-

lent Vaifya.

122. 'To him, who ferves Brahmens with a

· view to a heavenly reward, or even with a

view to both this life and the next, the union

of the word Brahmen with his name of servant

will affuredly bring fuccefs.

123. 'Attendance on Bráhmens is pro-

'nounced the best work of a Súdra: whatever

else he may perform will comparatively avail

him nothing.

124. They must allot him a fit mainte-

' nance according to their own circumstances,

4 after confidering his ability, his exertions, and

the number of those, whom he must provide

with nourishment:

125. 'What remains of their dreffed rice

* must be given to him; and apparel which

they have worn, and the refuse of their grain,

' and their old household furniture.

126. 'THERE is no guilt in a man of the

· fervile class, who eats leeks and other forbidden

* vegetables: he must not have the sacred inves-

titure: he has no business with the duty of

" making oblations to fire and the like; but there is

'no prohibition against bis offering dressed grain

' as a facrifice, by way of discharging his own duty.

127. 'Even Súdras, who are anxious to 'perform their entire duty, and, knowing what

they should perform, imitate the practice of

'good men in the household Sacraments, but

' without any holy text, except those containing

e praise and salutation, are so far from sinning,

' that they acquire just applause:

128. As a Súdra, without injuring another

man, performs the lawful acts of the twice-

6 born, even thus, without being censured, he

egains exaltation in this world and in the

e next.

129. No superfluous collection of wealth must be made by a Súdra, even though he

has power to make it, fince a fervile man,

who has amassed riches, becomes proud, and,

by bis insolence or neglect, gives pain even to

Brahmens.

130. 'Such, as have been fully declared,

6 are the several duties of the four classes in dis-

tress for subsistence; and, if they perform

them exactly, they shall attain the highest

6 beatitude.

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131. Thus has been propounded the fy-

frem of duties, religious and civil, ordained

for all classes: I next will declare the pure law

of expiation for fin.'

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On Penance and Expiation.

- 1. HIM, who intends to marry for the fake of having iffue; him, who wishes to
- make a facrifice; him, who travels; him, who
- has given all his wealth at a facred rite; him,
- who defires to maintain his preceptor, his
- father, or his mother; him, who needs a
- maintenance for himself, when he first reads the
- "Védas, and him, who is afflicted with illness;
 - 2. 'These nine Brahmens let mankind con-
- fider as virtuous mendicants, called fnatacas;
- ' and, to relieve their wants, let gifts of cattle or
- egold be presented to them in proportion to
- ' their learning:
- 3. 'To these most excellent Bråhmens must
- rice also be given with holy prefents at obla-
- tions to fire and within the consecrated circle;
- but the dreffed rice, which others are to re-
- ceive, must be delivered on the outside of the
- facred hearth: gold and the like may be given
- s any where.
 - 4. On fuch Brábmens, as well know the

· Veda, let the king bestow, as it becomes him,

'jewels of all forts, and the solemn reward for

officiating at the facrifice.

5. 'He, who has a wife, and, having beg-

e ged money to defray his nuptial expences, mar-

ries another woman, shall have no advantage but fenfual enjoyment: the offspring belongs

to the bestower of the gift.

6. LET every man, according to his ability,

' give wealth to Bráhmens detached from the

world and learned in scripture: such a giver

' shall attain heaven after this life.

7. 'HE alone is worthy to drink the juice of

the moonplant, who keeps a provision of

grain fufficient to fupply those, whom the law

commands him to nourish, for the term of

three years or more;

8. 'But a twiceborn man, who keeps a less

provision of grain, yet presumes to taste the ' juice of the moonplant, shall gather no fruit

from that facrament, even though he tafte it at

the first, or folemn, much less at any occasional,

ceremony.

9. 'HE, who bestows gifts on strangers with

a view to worldly fame, while he suffers his fa-

' mily to live in diftress, though he has power to support them, touches his lips with honey,

but fwallows poifon; fuch virtue is counter-

feit!

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- 10. Even what he does for the fake of his future spiritual body, to the injury of those,
- whom he is bound to maintain, shall bring
- him ultimate mifery both in this life and in the next.
- II. SHOULD a facrifice, performed by any twiceborn facrificer, and by a Bráhmen espe-
- cially, be imperfect from the want of some in-
- gredient, during the reign of a prince, who
- knows the law,
- 12. Let him take that article, for the com-
- " pletion of the facrifice, from the house of any
- · Vaifya, who possesses considerable herds, but
- e neither facrifices, nor drinks the juice of the
- " moonplant:
- 13. 'If fuch a Vaifya be not near, he may
- take two or three fuch necessary articles at
- ' pleasure from the house of a Súdra; since a
- Súdra has no business with solemn rites.
- 14. 'Even from the house of a Brábmen or
- ' a Cshatriya, who possesses a hundred cows,
- but has no confecrated fire, or a thousand
- cows, but performs no facrifice with the moon-
- ' plant, let a priest without scruple take the
- articles wanted.
- 15. From another Bráhmen. who continu-
- ally receives prefents but never gives, let him
- take fuch ingredients of the facrifice, if not

bestowed on request: so shall his fame be spread

' abroad, and his habits of virtue increase.

16. 'Thus, likewise, may a Bráhmen, who

has not eaten at the time of fix meals, or has

fasted three whole days, take at the time of the

' feventh meal, ar on the fourth morning, from the man, who behaves basely by not offering

· him food, enough to supply him till the mor-

frow:

17. 'He may take it from the floor, where

the grain is trodden out of the husk, or from the field, or from the house, or from any

place whatever; but, if the owner ask why be

takes it, the cause of the taking must be de-

clared.

18. The wealth of a virtuous Brahmen

must at no time be seized by a Cshatriya;

but, having no other means to complete a facrifice, he may take the goods of any man, who

acts wickedly, and of any, who performs not

his religious duties:

19. 'He, who takes property from the bad for the purpose before-mentioned, and bestows it

on the good, transforms himself into a boat,

'and carries both the good and the bad over a sea

of calamities.

20. Wealth, possessed by men for the performance of sacrifices, the wife call the pro-

- perty of the gods; but the wealth of men, who perform no facrifice, they confider as the property of demons.
- 21. Let no pious king fine the man, who takes by flealth or by force what he wants to
- " make a facrifice perfect; fince it is the king's
- ' folly, that causes the hunger or wants of a
- Bráhmen:
- 22. ' Having reckoned up the persons, whom
- the Brahmen is obliged to support, having as-
- certained his divine knowledge and moral
- conduct, let the king allow him a fuitable
- maintenance from his own household;
 - 23. And, having appointed him a mainte-
- * nance, let the king protect him on all fides;
- for he gains from the Brahmen, whom he pro-
- ' tects, a fixth part of the reward for his virtue.
 - 24. 'LET no Bråhmen ever beg a gift from
- a Súdra; for, if he perform a facrifice after
- fuch begging, he shall, in the next life, be
- 6 born a Chandala.
- 25. The Brahmen, who begs any articles
- for a facrifice, and disposes not of them all for
- that purpose, shall become a kite or a crow
- for a hundred years.
- 26. Any evilhearted wretch, who, through
- covetousness, shall seize the property of the
- ' gods or of Brahmens, shall feed in another
- world on the orts of vultures.

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- 27. The facrifice Vaiswanari must be con-
- fantly performed on the first day of the new
- year, or on the new moon of Chaitra, as an
- expiation for having omitted through mere for-
- e getfulness the appointed facrifices of cattle and
- the rites of the moonplant:
 - 28. 'But a twiceborn man, who, without
- e necessity, does an act allowed only in a case
- of necessity, reaps no fruit from it hereafter:
- thus has it been decided.
 - 29. 'By the Viswédévas, by the Sádhyas, and
- by eminent Rishis of the facerdotal class, the
- fubstitute was adopted for the principal act,
- when they were apprehensive of dying in
- times of eminent peril;
- 30. But no reward is prepared in a future
- fate for that illminded man, who, when able
- to perform the principal facrifice, has recourse
- to the substitute.
- 31. A Priest, who well knows the law,
- 6 needs not complain to the king of any grievous
- 'injury; fince, even by his own power, he may
- chastise those, who injure him:
- 32. 'His own power, which depends on him-
- * felf alone, is mightier than the royal power, which depends on other men: by his own might,
- therefore, may a Bráhmen coerce his foes,
- 33. 'He may use, without hesitation, the powerful charms revealed to AT'HARVAN, and

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by him to Angiras; for speech is the weapon

of a Brabmen: with that he may destroy his

oppressors.

34. A foldier may avert danger from him-

felf by the strength of his arm; a merchant

and a mechanick, by their property; but the

chief of the twiceborn, by holy texts and ob-

flations to fire.

35. 'A priest, who performs his duties, who

justly corrects his children and pupils, who ad-

vises expiations for fin, and who loves all ani-

mated creatures, is truly called a Brahmen: to

6 him let no man fay any thing unpropitious,

onor use any offensive language.

36. Let not a girl, nor a young woman

married or unmarried, nor a man with little

e learning, nor a dunce, perform an oblation to

fire; nor a man diseased, nor one uninvested

with the sacrificial string;

37. Since any of those persons, who make

fuch an oblation, shall fall into a region of

torture, together with him, who fuffers his

hearth to be used: he alone, who perfectly

knows the facred ordinances, and has read all

the Vėdas, must officiate at an oblation to holy

6 fire.

38. A Bráhmen with abundant wealth, who

presents not the priest, that hallows his fire,

with a horse consecrated to PRAJA'PATI,

- becomes equal to one who has no fire hallowed.
- 39. Let him, who believes the scripture, and keeps his organs in subjection, perform
- all other pious acts; but never in this world
- let him offer a facrifice with trifling gifts to
- the officiating priest:
- 40. 'The organs of sense and action, reput tation in this life, a heavenly mansion in the
- ' next, life itself, a great name after death, chil-
- dren, and cattle, are all destroyed by a facri-
- fice offered with trifling presents: let no man,
- therefore, facrifice without liberal gifts.
 - 41. 'THE priest, who keeps a sacred hearth,
- but voluntarily neglects the morning and even-
- ing oblations to his fires, must perform, in the
- manner to be described, the penance chándráyana
- for one month; fince that neglect is equally
- finful with the flaughter of a fon.
- 42. They, who receive property from a
- Súdra for the performance of rites to conse-
- crated fire, are contemned as ministers of the
- base, by all such as pronounce texts of the
- · Véda:
- 43. 'Of those ignorant priests, who serve
- the holy fire for the wealth of a Súdra, the
- e giver shall always tread on the foreheads, and
- thus pass over miseries in the gloom of death.
 - 44. 'Every man, who does not an act pre-

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- fcribed, or does an act forbidden, or is guilty
- of excess even in legal gratifications of the
- fenses, must perform an expiatory penance.
 - 45. 'Some of the learned confider an expia-
- tion as confined to involuntary fin; but others,
- from the evidence of the Veda, hold it effec-
- tual even in the case of a voluntary offence:
- 46. A fin, involuntarily committed, is re-
- moved by repeating certain texts of the fcrip-
- ture; but a fin committed intentionally,
- through strange infatuation, by harsh penances
- of different forts.
 - 47. 'IF a twiceborn man, by the will of
- God in this world, or from his natural birth,
- have any corporeal mark of an expiable fin
- committed in this or a former state, he must
- 6 hold no intercourse with the virtuous, while
- his penance remains unperformed.
 - 48. 'Some evilminded persons, for fins com-
- mitted in this life, and some for bad actions
- in a preceding state, suffer a morbid change
- s in their bodies:
- 49. 'A stealer of gold from a Bråhmen has
- * whitlows on his nails; a drinker of spirits,
- black teeth; the flayer of a Bráhmen, a ma-
- rasmus; the violator of his guru's bed, a de-
- formity in the generative organs;
- 50. 'A malignant informer, fetid ulcers in
- his nostrils; a false detractor, stinking breath;

- 'a stealer of grain, the defect of some limb; a
- · mixer of bad wares with good, some redundant
- " member;
- 51. 'A stealer of dressed grain, dyspepsia;
- a stealer of holy words, or an unauthorized
- · reader of the scriptures, dumbness; a stealer
- of clothes, leprofy; a horsestealer, lameness;
 - 52. 'The stealer of a lamp, total blindness;
- the mischievous extinguisher of it, blindness
- in one eye; a delighter in hurting sentient
- creatures, perpetual illness; an adulterer,
- " windy fwelling in his limbs:
- 53. 'Thus, according to the diversity of ac-
- tions, are born men despised by the good, stupid,
- dumb, blind, deaf, and deformed.
 - 54. 'Penance, therefore, must invariably be
- * performed for the fake of expiation; fince
- they, who have not expiated their fins, will
- again spring to birth with disgraceful marks.
 - 55. 'KILLING a Bråhmen, drinking for-
- bidden liquor, stealing gold from a priest,
- * adultery with the wife of a father, natural or
- fpiritual, and affociating with fuch as commit
- * those offences, wise legislators must declare to
- be crimes in the highest degree, in respect of
- those after mentioned, but less than incest in a
- · direct line, and some others.
 - 56. 'FALSE boasting of a high tribe, malig-
- nant information, before the king, of a crimi-

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- * nal who must suffer death, and falsely accusing a
- * spiritual preceptor, are crimes in the second de-
- * gree, and nearly equal to killing a Brahmen.
 - 57. 'Forgetting the texts of scripture, show-
- ing contempt of the Veda, giving false evi-
- dence without a bad motive, killing a friend
- * without malice, eating things prohibited, or,
- from their manifest impurity, unfit to be tasted,
- are fix crimes nearly equal to drinking spirits;
- but perjury and homicide require in atrocious cases
- the harshest expiation.
 - 58. 'To appropriate a thing deposited or
- e lent for a time, a human creature, a horse,
- * precious metals, a field, a diamond, or any
- other gem, is nearly equal to stealing the gold
- of a Bráhmen.
 - 59. 'Carnal commerce with fifters by the
- fame mother, with little girls, with women
- of the lowest mixed class, or with the wives
- 6 of a friend or of a son, the wise must consider
- as nearly equal to a violation of the paternal
- bed.
 - 60. SLAYING a bull or cow, facrificing
- 4 what ought not to be facrificed, adultery, fell-
- sing onefelf, deferting a preceptor, a mother,
- a father, or a fon, omitting to read the scrip-
- * ture, and neglect of the fires prescribed by the
- Dhermasastra only,
 - 61. 'The marriage of a younger brother be-

- fore the elder, and that elder's omission to
- marry before the younger, giving a daughter
- to either of them, and officiating at their
- nuptial facrifice,
 - 62. Defiling a damfel, usury, want of per-
- · fect chaftity in a student, selling a holy pool
- for garden, a wife, or a child,
 - 63. 'Omitting the facred investiture, aban-
- doning a kinfman, teaching the Véda for hire,
- · learning it from a hired teacher, felling com-
- * modities, that ought not to be fold,
 - 64. Working in mines of any fort, engaging
- in dykes, bridges, or other great mechanical
- works, spoiling medicinal plants repeatedly,
- fubfifting by the barlotry of a wife, offering
- facrifices and preparing charms to destroy the
- innocent,
- 65. Cutting down green trees for firewood,
- performing holy rites with a felfish view
- merely, and eating prohibited food once with-
- out a previous design,
 - 66. 'Neglecting to keep up the consecrated
- fire, stealing any valuable thing besides gold,
- on nonpayment of the three debts, application to
- the books of a false religion, and excessive at-
- fention to mufick or dancing,
 - 67. Stealing grain, base metals, or cattle,
- familiarity by the twiceborn with women, who
- have drunk inebriating liquor, killing without

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- * malice, a woman, a Súdra, a Vaisya, or a Csba-
- ' triya, and denying a future state of rewards
- and punishments, are all crimes in the third
- degree, but higher or lower according to circumfrances.
 - 68. 'GIVING pain to a Brahmen, smelling at
- any spirituous liquor or any thing extremely
- fetid and unfit to be fmelt, cheating, and un-
- ' natural practices with a male, are confidered
- as caufing a loss of class.
 - 69. 'To kill an ass, a horse, a camel, a deer,
- ' an elephant, a goat, a sheep, a fish, a snake, or
- a buffalo, is declared an offence, which de-
- grades the killer to a mixed tribe.
 - 70. 'ACCEPTING presents from despicable
- e men, illegal traffick, attendance on a Súdra
- mafter, and speaking falsehood, must be con-
- fidered as causes of exclusion from social re-
- pasts.
 - 71. 'KILLING an insect, small or large, a
- worm, or a bird, eating what has been brought
- ' in the same basket with spirituous liquor, steal-
- ' ing fruit, wood, or flowers, and great pertur-
- bation of mind on triffing occasions, are of-
- fences which cause defilement.
 - 72. 'You shall now be completely instruct-
- ed in those penances, by which all the fins
- 'just mentioned are expiable.
 - 73. 'IF a Brahmen have killed a man of the

facerdotal class, without malice prepense, the

· flayer being far superior to the slain in good qua-

· lities, he must himself make a hut in a forest

and dwell in it twelve whole years, fubfifting

on alms for the purification of his foul, placing

near him, as a token of his crime, the skull of

the slain, if he can procure it, or, if not, any hu-

e man skull. The time of penance for the three

· lower classes must be twenty four, thirty six, and · forty eight, years.

74. Or, if the flayer be of the military class,

he may voluntarily expose himself as a mark

to archers, who know his intention; or, ac-

cording to circumstances, may cast himself head-

fire.

75. Or, if he be a king, and slew a priest without malice or knowledge of his class, he may

e perform, with presents of great wealth, one of

the following facrifices; an Aswamedha, or a

· Swerjit, or a Gosava, or an Abhijit, or a Vis-

wajit, or a Trivrit, or an Agnishtut.

76. 'Or, to expiate the guilt of killing a

priest without knowing him and without design,

the killer may walk on a pilgrimage a hundred

yójanas, repeating any one of the Védas, eating

barely enough to fustain life, and keeping his

organs in perfect subjection;

77. 'Or, if in that case the slayer be unlearned

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- * but rich, he may give all his property to some
- 6 Brábmen learned in the Véda, or a sufficiency
- of wealth for his life, or a house and furniture
- to hold robile he lives:
 - 78. 'Or, eating only fuch wild grains as are
- offered to the gods, he may walk to the head
- of the river Sarafwati against the course of
- the stream; or, subfisting on very little food,
- he may thrice repeat the whole collection of
- ' Vedas, or the Rich, Yajush, and Saman.
 - 79. Or, his hair being shorn, he may dwell
- e near a town, or on pastureground for cows,
- or in some holy place, or at the root of a sa-
- cred tree, taking pleasure in doing good to
- cows and to Brahmens;
 - 80. 5 There, for the preservation of a cow
- or a Brahmen, let him instantly abandon life;
- ' fince the preserver of a cow or a Bráhmen
- atones for the crime of killing a priest:
 - 81. Or, by attempting at least three times
- forcibly to recover from robbers the property
- of a Bráhmen, or by recovering it in one of
- his attacks, or even by losing his life in the
- attempt, he atones for his crime.
 - 82. 'Thus, continually firm in religious
- ' austerity, chaste as a student in the first order,
- with his mind intent on virtue, he may ex-
- piate the guilt of undesignedly killing a Brab-
- · men, after the twelfth year has expired.

83. Or, if a virtuous Brahmen unintention.

e ally kill another, who had no good quality, he

may atone for his guilt by proclaiming it in

an affembly of priests and military men, at

the facrifice of a horse, and by bathing with

other Brahmens at the close of the facrifice:

84. ' Bráhmens are declared to be the basis,

and Cshatriyas the summit, of the legal system:

he, therefore, expiates his offence by fully

proclaiming it in fuch an affembly.

85. 'From his high birth alone, a Bråbmen

is an object of veneration even to deities: his

declarations to mankind are decifive evidence;

and the Véda itself confers on him that cha-

racter.

86. Three at least, who are learned in the

· Véda, should be affembled to declare the proper

expiation for the fin of a priest, but, for the

three other classes, the number must be doubled,

* tripled, and quadrupled: what they declare

fhall be an atonement for finners; fince the

words of the learned give purity.

87. 'Thus a Brahmen, who has performed

one of the preceding expiations, according to

the circumstances of the homicide and the cha-

* racters of the persons killed and killing, with his

whole mind fixed on God, purifies his foul,

and removes the guilt of flaying a man of his

cown class:

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88. He must perform the same penance

for killing an embryo, the fex of which was

unknown, but whose parents were facerdotal,

or a military or a commercial man employed

in a facrifice, or a Brábmeni woman, who has

bathed after temporary uncleanness;

89. And the fame for giving false evidence

in a cause concerning land or gold or precious

commodities, and for accusing his preceptor un-

iustly, and for appropriating a deposit, and

for killing the wife of a priest, who keeps a

6 consecrated fire, or for flaying a friend.

90. Such is the atonement ordained for

'killing a priest without malice; but for killing

a Bráhmen with malice prepense, this is no

expiation: the term of twelve years must be

doubled, or, if the case was atrocious, the mur-

6 derer must actually die in stames or in battle.

91. 'Any twiceborn man, who has inten-

' tionally drunk spirit of rice, through perverse

delufion of mind, may drink more spirit in

flame, and atone for his offence by feverely

burning his body;

92. Or he may drink boiling hot, until he

die, the urine of a cow, or pure water, or

6 milk, or clarified butter, or juice expressed

from cowdung:

93. Or, if he tasted it unknowingly, he may

expiate the fin of drinking spirituous liquor, VOL. VI.

- · by eating only some broken rice or grains of
- · tila, from which oil has been extracted, once
- every night for a whole year, wrapped in
- coarse vesture of hairs from a cow's tail, or
- fitting unclothed in his house, wearing his locks
- and beard uncut, and putting out the flag of
- a tavern-keeper.
 - 94. 'Since the spirit of rice is distilled from
- the Mala, or filthy refuse, of the grain, and
- fince Mala is also a name for fin, let no Bráb-
- s men, Cshatriya, or Vaisya drink that spirit.
 - 95. 'Inebriating liquor may be considered
- * as of three principal forts; that extracted from
- dregs of fugar, that extracted from bruifed
- rice, and that extracted from the flowers of
- the Madhuca: as one, fo are all; they shall
- onot be tasted by the chief of the twiceborn.
 - of. Those liquors, and eight other forts,
- with the flesh of animals, and A'sava, the
- with the hell of antihals, and 21 java, the
- most pernicious beverage, prepared with nar-
- cotick drugs, are swallowed at the juncates of
- ' Yacshas, Racshasas, and Pisachas: they shall
- 'not, therefore, be tasted by a Bráhmen, who
- 'feeds on clarified butter offered to gods.
 - 97. ' A Brahmen, stupesied by drunkenness,
- 6 might fall on something very impure, or might
- even, when intoxicated, pronounce a fecret
- 's phrase of the Vėda, or might do some other
- 'act, which ought not to be done.

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98. When the divine spirit, or the light of holy knowledge, which has been insused into

his body, has once been fprinkled with any

' intoxicating liquor, even his priestly charac-

f ter leaves him, and he finks to the low degree

of a Sudra.

99. Thus have been promulgated the various modes of expiation for drinking spirits:

I will next propound the atonement for steal-

ing the gold of a priest to the amount of a fuverna.

100. 'HE, who has purloined the gold of a

" Brahmen, must hasten to the king, and pro-

claim his offence; adding, "Inflict on me

" the punishment due to my crime."

101. 'Then shall the king himself, taking

from him an iron mace, which the criminal must

bear on his shoulder, strike him with it once;

and by that stroke, whether he die or be only

' left as dead, the thief is released from sin: a

· Brahmen by rigid penance alone can expiate

that offence; another twiceborn man may also

e perform such a penance at his election.

102. The twiceborn man, who desires to remove by austere devotion the taint caused

by stealing gold, must perform in a forest, co-

one of march a march of march half of

vered with a mantle of rough bark, the pe-

ance before ordained for him, who without

* malice prepense has killed a Bråhmen.

103. By these expiations may the twiceborn atone for the guilt of stealing gold from a

priest; but the sin of adultery with the wife

of a father, natural or spiritual, they must ex-

e piate by the following penances.

104. 'HE, who knowingly and actually has

defiled the wife of his father, she being of the

fame class, must extend himself on a heated iron bed, loudly proclaiming his guilt; and,

there embracing the red-hot iron image of a

woman, he shall atone for his crime by death; 105. Or, having himself amputated his

penis and fcrotum, and holding them in his

fingers, he may walk in a direct path toward

the fouthwest, or the region of NIRRITI, un-

fil he fall dead on the ground:

106. Or, if he had mistaken her for another

" woman, he may perform for a whole year,

with intense application of mind, the penance

prájápatya, with part of a bed, or a human .

' bone, in his hand, wrapped in vesture of coarse

bark, letting his hair and beard grow, and

' living in a deserted forest:

107. Or, if she was of a lower class and a

corrupt woman, he may expiate the fin of vio-

lating the bed of his father, by continuing the

penance chándráyana for three months, al-

ways mortifying his body by eating only fo-

rest herbs, or wild grains boiled in water.

108. 'By the preceding penances may fin-'ners of the two higher degrees atone for their 'guilt; and the less offenders may expiate theirs 'by the following austerities.

offence of killing a cow without malice, must drink for the first month barleycoms boiled fost in water; his head must be shaved entirely; and, covered with the hide of the slain cow, he must fix his abode on her late pasture ground:

* Wild grains, but without any factitious falt, for the next two months at the time of each fourth repast, on the evening of every second day; regularly bathing in the urine of cows, and keeping his members under controul:

* and stand quasting the dust raised by their hoofs; at night, having servilely attended and stroked and saluted them, he must surround them with a sence, and sit near to guard them:

III. 'All day he must wait on the herd,

112. 'Pure and free from passion, he must stand, while they stand; follow them, when they move together; and lie down by them, when they lie down:

113. 'Should a cow be sick or terrissed by

" tigers or thieves, or fall, or flick in mud, he

* must relieve her by all possible means:

114. In heat, in rain, or in cold, or while

- the blast furiously rages, let him not seek his
- own shelter, without first sheltering the cows
- to the utmost of his power.
 - 115. ' Neither in his own house, or field, or
- floor for treading out grain, nor in those of
- any other person, let him say a word of a
- cow, who eats corn or grass, or of a calf, who
- drinks milk:
 - 116. By waiting on a herd, according to
- these rules, for three months, the slayer of a
- cow atones for his guilt;
 - 117. ' But, his penance being performed,
- he must give ten cows and a bull, or, his
- flock not being so large, must deliver all he
- opossesses, to fuch as best know the Véda.
- 118. 'THE preceding penances, or that called
- * chándráyana, must be performed for the abso-
- Iution of all twiceborn men, who have com-
- mitted fins of the lower or third degree; ex-
- cept those, who have incurred the guilt of an
- « avaçirna;
 - 119. 'But he, who has become Avacirni, must
- facrifice a black or a oneeyed ass, by way of a
- " meatoffering to NIRRITI, patroness of the South-
- * west, by night in a place where four ways meet:

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120. Let him daily offer to her in fire the

fat of that als, and, at the close of the ceremony,

'let him offer clarified butter, with the holy

text Sem and so forth, to PAVANA, to INDRA,

to VRIHASPATI, and to AGNI, regents of

e wind, clouds, a planet, and fire.

121. 'A voluntary effusion, naturally or

otherwise, of that which may produce a man

6 by a twiceborn youth during the time of his

's studentship or before marriage, has been pro-

'nounced avacirna, or a violation of the rule

' prescribed for the first order, by sages, who

knew the whole fystem of duty, and uttered

the words of the Véda.

122. 'To the four deities of purification,

MA'RUTA, INDRA, VRIHASPATI, AGNI,

goes all the divine light, which the Véda had

imparted, from the student, who commits the

fout fin avacirna;

123. 'But, this crime having actually been

committed, he must go begging to seven

houses, clothed only with the hide of the fa-

crificed ass, and openly proclaiming his act:

124. 'Eating a fingle meal begged from

them, at the regular time of the day, that is,

in the morning or evening, and bathing each

day at the three favanas, he shall be absolved

from his guilt at the end of one year.

125. 'HE, who has voluntarily committed any fin, which causes a loss of class, must perform the tormenting penance, thence called 'Sántapana; or the prájápatya, if he offended ' involuntarily.

126. For fins, which degrade to a mixed class, or exclude from society, the finner must

have recourse to the lunar expiation chandray-

ana for one month: to atone for acts, which

occasion defilement, he must swallow nothing

for three days but hot barleygruel.

127. For killing intentionally a virtuous man of the military class, the penance must be

a fourth part of that ordained for killing a

' priest; for killing a Vaifya, only an eighth;

for killing a Súdra, who had been constant in

discharging his duties, a fixteenth part:

128. 'But, if a Bráhmen kill a Cshatriya without malice, he must, after a full perform-

ance of his religious rites, give the priests one

6 bull together with a thousand cows;

129. 'Or he may perform for three years

the penance for flaying a Brahmen, mortify-

ing his organs of fenfation and action, letting

his hair grow long, and living remote from

6 the town, with the root of a tree for his man-6 fion.

130. 'If he kill without malice a Vaisya, who

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- had a good moral character, he may perform
- the same penance for one year, or give the
- ' priefts a hundred cows and a bull:
- 131. 'For fix months must be perform this
- ' whole penance, if without intention he kill a Sú-
- ' dra; or he may give ten white cows and a 'bull to the priests.
- 132. If he kill by design a cat, or an ich-
- 'neumon, the bird Chásha, or a frog, a dog, a
- 'lizard, an owl, or a crow, he must perform
- ' the ordinary penance required for the death of
- ' a Súdra, that is, the chandrayana:
- 133. Or, if he kill one of them und fignedly,
- he may drink nothing but milk for three days
- and nights, or each night walk a yogan, or
- ' thrice bathe in a river, or filently repeat the
- 'text on the divinity of water; that is, if he be
- ' disabled by real infirmity from performing the
- first mentioned penances, he may have recourse to
- the next in order.
- 134. ' A Bråhmen, if he kill a snake, must
- ' give to some priest a hoe, or ironheaded stick; if
- ' an eunuch, a load of ricestraw, and a máska of
- · lead;
 - 135. 'If a boar, a pot of clarified butter; if
- the bird tittiri, a drona of tila feeds: if a par-
- 'rot, a steer two years old; if the waterbird
- ' crauncha, a steer aged three years:
 - 1.36. 'If he kill a goose, or a phenicopteros, a

'beron, or cormorant, a bittern, a peacock, an ape, a hawk, or a kite, he must give a cow to some Bráhmen:

137. If he kill a horse, he must give a mantle; if an elephant, five black bulls; if a goat or a sheep, one bull; if an ass, a calf one year old:

138. 'If he kill a carnivorous wild beaft, he "must give a cow with abundance of milk; if a wild beast not carnivorous, a fine heiser; and "a rasticá of gold, if he slay a camel:

139. 'If he kill a woman of any class caught in adultery, he must give as an expiation, in the direct order of the sour classes, a leathern pouch, a bow, a goat, and a sheep.

* 140. 'Should a Bráhmen be unable to expitate by gifts the fin of killing a fnake and the rest, he must atone for his guilt by performing, on each occasion, the penance prájápatya.

141. 'For the flaughter of a thousand small animals which have bones, or for that of boneless animals enow to fill a cart, he must perform the chándráyana, or common penance for killing a Súdra;

142. 'But, for killing boned animals, he must also give some trisle, as a pana of copper, to a Brábmen: for killing those without bones, he may be absolved by holding his breath, at the close of his penance, while he thrice repeats

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the gayatri with its bead, the pranava, and the vyabritis.

143. 'For cutting once without malice trees 'yielding fruit, shrubs with many crowded

ftems, creeping or climbing plants, or fuch as

' grow again when cut, if they were in bloffom

' when he hurt them, he must repeat a hundred

' texts of the Véda.

144. 'For killing infects of any fort bred in 'rice or other grains, or those bred in honey or 'other fluids, or those bred in fruit or flowers,

eating clarified butter is a full expiation.

145. If a man cut, wantonly and for no good purpose, such grasses as are cultivated, or such as rise in the forest spontaneously, he

' must wait on a cow for one day, nourithed by

" milk alone.

146. 'By these penances may mankind atone for the sin of injuring sentient creatures, whether committed by design or through inadvertence: hear now what penances are ordained
for eating or drinking what ought not to be

stafted.

147. 'HE, who drinks undefignedly any spi-'rit but that of rice, may be absolved by a new 'investiture with the facrificial string: even for 'drinking intentionally the weaker forts of spirit, 'a penance extending to death must not (as the

' law is now fixed) be prescribed.

148. For drinking water which has flood

in a veffel, where spirit of rice or any other

'spirituous liquor had been kept, he must swal-

'low nothing, for five days and nights, but the

fplant sanc'bapushpi boiled in milk:

149. 'If he touch any spirituous liquor, or

give any away, or accept any in due form, or

with thanks, or drink water left by a Súdra,

"he must swallow nothing, for three days and

nights, but cus'a-grass boiled in water.

150. 'Should a Bráhmen, who has once taft-

ed the holy juice of the moonplant, even smell

the breath of a man who has been drinking

fpirits, he must remove the taint by thrice re-

peating the gáyatrì, while he suppresses his

breath in water, and by eating clarified butter

e after that ceremony.

151. 'IF any of the three twiceborn classes

have tasted unknowingly human ordure or

urine, or any thing that has touched spirituous

'liquor, they must, after a penance, be girt

f anew with the facrificial thread;

152. But, in fuch new investiture of the

twiceborn, the partial tonfure, the zone, the

ftaff, the petition of alms, and the strict rules

of abstinence, need not be renewed.

153. 'SHOULD one of them eat the food of

those persons, with whom he ought never to

eat, or food left by a woman or a Súdra, or

any prohibited flesh, he must drink barleygruel only for seven days and nights.

154. 'If a Brahmen drink fweet liquors turned acid, or aftringent juices from impure

fruits, he becomes unclean, as long as those

' fluids remain undigested.

155. Any twiceborn man, who by accident has tasted the dung or urine of a tame boar,

an ass, a camel, a shakal, an ape or a crow,

' must perform the penance chándráyana:

156. 'If he tafte dried fleshmeat, or mushrooms rising from the ground, or any thing

brought from a flaughter-house, though he

knew not whence it came, he must perform

' the fame penance.

157. For knowingly eating the flesh of carinvorous beafts, of town-boars, of camels, of

'gallinaceous birds, of human creatures, of

crows, or of affes, the penance taptacrich' bra,

or burning and fevere, is the only atonement.

158. 'A Brábmen, who, before he has com-'pleted his theological studies, eats food at

'monthly obsequies to one ancestor, must fast

* three days and nights, and fit in water a day:

159. 'But a student in theology, who at any

time unknowingly tastes honey or flesh, must

perform the lowest penance, or the prájápatya,

and proceed to finish his studentship.

160. 'Having eaten what has been left by a

cat, a crow, a moufe, a dog, or an ichneumon,

or what has even been touched by a loufe, he

must drink, boiled in water, the plant brah-

· musuverchalá.

161. By the man, who feeks purity of foul,

ono forbidden food must be tasted: what he has

undefignedly swallowed he must instantly

vomit up, or must purify himself with speed by legal expiations.

162. 'Such, as have been declared, are the

various penances for eating prohibited food:

hear now the law of penance for an expiation of theft.

163. 'The chief of the twiceborn, having

' voluntarily stolen such property, as grain, raw

or dreffed, from the house of another Bráb-

" men, shall be absolved on performing the pe-

' nance prájápatya for a whole year;

164. 'But the penance chándráyana must be 'performed for stealing a man, woman, or

child, for feizing a field, or a house, or for

' taking the waters of an enclosed pool or well.

165. 'Having taken goods of little value

from the house of another man, he must pro-

cure absolution by performing the penance

'Sántapana; having first restored, as the peni-

* tent thief always must, the goods that he stole.

166. For taking what may be eaten, or what may be fipped, a carriage, a bed, or a

'feat, roots, flowers, or fruit, an atonement

e may be made by swallowing the five pure

'things produced from a cow, or milk, curds,

butter, urine, dung:

167. 'For stealing grass, wood, or trees, rice

in the husk, molasses, cloth or leather, fish, or

other animal food, a strict fast must be kept

* three days and three nights.

168. 'For stealing gems, pearls, coral, cop-

per, filver, iron, brass, or stone, nothing but

4 broken rice must be swallowed for twelve

days;

169. And nothing but milk for three days,

if cotton, or filk, or wool had been stolen, or

a beaft either with cloven or uncloven hoofs,

or a bird, or perfumes, or medicinal herbs, or

cordage.

170. By these penances may a twiceborn

6 man atone for the guilt of theft; but the fol-

'lowing aufterities only can remove the fin of

carnally approaching those, who must not be

carnally approached.

171. 'HE, who has wasted his manly

ftrength with fifters by the same womb, with

6 the wives of his friend or of his fon, with girls

' under the age of puberty, or with women of

the lowest classes, must perform the penance

ordained for defiling the bed of a preceptor:

172. 'He, who has carnally known the

daughter of his paternal aunt, who is almost

' equal to a fister, or the daughter of his mater-

f nal aunt, or the daughter of his maternal

uncle, who is a near kinfman, must perform the

· chándráyana, or lunar penance;

173. No man of fense would take one of those three as his wife: they shall not be taken

in marriage by reason of their consanguinity;

in marriage by reason of their contanguinty;

and he, who marries any one of them, falls

deep into fin.

174. 'He, who has wasted, what might 'have produced a man, with semale brute ani'mals, with a woman during her courses, or in 'any but the natural part, or in water, must 'perform the penance santapana: for a bestial 'act with a cow the penance must be far more se-

175. A twiceborn man, dallying lasciviously with a male in any place or at any time, or with a female in a carriage drawn by bullocks,

with a temale in a carriage drawn by bullocks, or in water, or by day, shall be degraded, and

must bathe himself publickly, with his apparel.

176. 'Should a Bráhmen carnally know a

woman of the Chandala or Mléch'ha tribes, or

taste their food, or accept a gift from them,

he loses his own class, if he acted unknowingly,

or, if knowingly, finks to a level with them.

177. A wife, excessively corrupt, let her husband confine to one apartment, and compel

'her to perform the penance ordained for a

man, who has committed adultery:

178. 'If, having been folicited by a man of

' her own class, she again be defiled, her expia-

'tion must be the penance prájápatya added to

the chándráyana.

179. 'The guilt of a Bráhmen, who has dal-

' lied a whole night with a Chandálí woman, he

' may remove in three years by fubfifting on

alms, and inceffantly repeating the gáyatrì

' with other mysterious texts.

180. 'These penances have been declared for

' finners of four forts, those who hurt sentient

creatures, those who eat prohibited food, those

who commit theft, and those who are guilty of

' lasciviousness: hear now the prescribed expia-

' tion for fuch, as hold any intercourse with de-

' graded offenders.

181. 'HE, who affociates himself for one year with a fallen sinner, falls like him; not

by facrificing, reading the Véda, or contracting

affinity with him, fince by those acts he loses his

" class immediately, but even by using the same

carriage or feat, or by taking his food at the

fame board:

182. 'That man, who holds an intercourse with any one of those degraded offenders,

must perform, as an atonement for such inter-

course, the penance ordained for that sinner himself.

183. 'The sapindas and samánódacas of a man degraded, for a crime in the first degree, must

offer a libation of water to his manes, as if he

* were naturally dead, out of the town, in the evening of some inauspicious day, as the ninth

of the moon, his paternal kinfmen, his officiat-

ing priest, and his spiritual guide being present.

184. 'A female flave must kick down with her foot an old pot filled with water, which had for that purpose been placed towards the fouth, as if it were an oblation for the dead; and all the kinsmen, in the nearer and remoter degrees, must remain impure for a day and a

' night:

185. 'They must thenceforth desist from 'speaking to him, from sitting in his company, from delivering to him any inherited or other property, and from every civil or usual attention, as inviting him on the first day of the year, and the like.

186. 'His right of primogeniture, if he was an elder brother, must be withholden from him, and whatever perquisites arise from priority of birth: a younger brother excelling him in virtue, must appropriate the share of

' the firstborn.

187. 'But, when he has performed his due 'penance, his kinfmen and he must throw down a new vessel full of water, after having bathed together in a pure pool:

188. 'Then must he cast that vessel into the 'water; and, having entered his house, he may 'perform, as before, all the acts incident to his 'relation by blood.

189. 'The fame ceremony must be performed by the kindred even of women degraded, for whom clothes, dressed rice, and water must be provided; and they must dwell in buts near the family house.

190. With finners, whose expiations are unperformed, let not a man transact business of any kind; but those, who have performed their expiations, let him at no time reference:

191. Let him not, however, live with those, who have slain children, or injured their benefactors, or killed suppliants for protection, or put women to death, even though such offenders have been legally purified.

192. 'Those men of the twiceborn classes, to 'whom the gáyatr' has not been repeated and 'explained, according to law, the assembly must cause to perform three prájápatya penances, and afterwards to be girt with the facrificial ftring;

193. And the fame penance they must preferibe to such twiceborn men, as are anxious to atone for some illegal act, or a neglect of the Véda.

194. 'If priests have accepted any property from base hands, they may be absolved by re'linquishing the presents, by repeating mysteri'out texts, and by acts of devotion:

ous texts, and by acts of devotion:

195. 'By three thousand repetitions of the 'gáyatr' with intense application of mind, and 'by subsisting on milk only for a whole month in the pasture of cows, a Brábmen, who has 'received any gift from a bad man, or a bad gift from any man, may be cleared from sin.

196. 'When he has been mortified by abstinence, and has returned from the pasturage, let him bend low to the other *Bráhmens*, who must thus interrogate him: "Art thou really desirous, good man, of readmission to an equality with us?"

197. 'If he answer in the affirmative, let 'him give some grass to the cows, and in the 'place, made pure by their having eaten on it, 'let the men of his class give their assent to his 'readmission.

198. 'HE, who has officiated at a facrifice for outcasts, or burned the corpse of a stranger, or performed rites to destroy the innocent, or made the impure facrifice, called *Abina*, may

expiate his guilt by three prájápatya pe-

199. 'A TWICEBORN man, who has reject'ed a suppliant for his protection, or taught the
'Véda on a forbidden day, may atone for his
'offence by subsisting a whole year on barley

alone.

200. 'HE, who has been bitten by a dog, a 'fhakal, or an ass, by any carnivorous animal 'frequenting a town, by a man, a horse, a 'camel, or a boar, may be purified by stop-'ping his breath during one repetition of the 'gáyatr'.

201. 'To eat only at the time of the fixth 'meal, or on the evening of every third day, for a 'month, to repeat a Sankità of the Védas, and 'to make eight oblations to fire, accompanied 'with eight holy texts, are always an expiation 'for those, who are excluded from fociety at 'repasts.

202. 'SHOULD a Bráhmen voluntarily ascend a carriage borne by camels or drawn by asses, or designedly bathe quite naked, he may be absolved by one suppression of breath, while he repeats in his mind the most holy text.

203. 'HE, who has made any excretion, being greatly pressed, either without water near bim, or in water, may be purished by

bathing in his clothes out of town, and by touching a cow.

204. For an omission of the acts, which the Véda commands to be constantly performed, and for a violation of the duties prescribed to a housekeeper, the atonement is fasting one

6 day.

205. 'HE, who says hush or pish to a Bráhmen, or thou to a superior, must immediately bathe, eat nothing for the rest of the day, and appease him by clasping his feet with respectful salutation.

206. For striking a Brahmen even with a blade of grass, or tying him by the neck with a cloth, or overpowering him in argument, and adding contemptuous words, the offender must soothe him by falling prostrate.

207. 'An affaulter of a Brahmen, with intent to kill, shall remain in hell a hund ed years; for actually striking him with the like intent, a thousand:

208. As many fmall pellets of dust as the blood of a Bráhmen collects on the ground, for so many thousand years must the shedder

of that blood be tormented in hell.

209. For a simple assault, the first or common penance must be performed; for a battery, the third or very severe penance; but for shedding blood, without killing, both of those penances.

210. To remove the fins, for which no particular penance has been ordained, the

e affembly must award a fit expiation, consider-

ing the ability of the finner to perform it, and the nature of the fin.

211. Those penances, by which a man

may atone for his crimes, I now will describe

to you; penances, which have been performed by deities, by holy fages, and by forefathers

of the human race.

212. WHEN a twiceborn man performs the common penance, or that of PRAJA'PATI,

6 he must for three days eat only in the morn-

ing; for three days, only in the evening; for

three days, food unasked but presented to bim;

and for three more days, nothing.

213. Eating for a whole day the dung and urine of cows mixed with curds, milk, cla-

rified butter, and water boiled with cus'a-grass,

s and then fasting entirely for a day and a night,

6 is the penance called Sántapana, either from

the devout man SANTAPANA, or from tor-

" menting.

214. A twiceborn man performing the peonance, called very severe, in respect of the com-

6 mon, must eat, as before, a fingle mouthful, or

- a ball of rice as large as a ben's egg, for three
- times three days; and for the last three days,
- 6 must wholly abstain from food.
 - 215. A Bråhmen, performing the ardent
- e penance, must swallow nothing but hot water,
- hot milk, hot clarified butter, and hot steam,
- each of them for three days successively, per-
- forming an ablution, and mortifying all his
- e members.
- 216. A total fast for twelve days and nights,
- by a penitent with his organs controlled and
- ' his mind attentive, is the penance named pa-
- ' ráca, which expiates all degrees of guilt.
 - 217. 'If he diminish his food by one mouth-
- ' ful each day during the dark fortnight, eating
- fifteen mouthfuls on the day of the opposition, and
- s increase it in the Same proportion, during the
- bright fortnight, fasting entirely on the day of
- ' the conjunction, and perform an ablution regu-
- ' larly at sunrise, noon, and sunset, this is the
- 'chándráyana, or the lunar penance:
- 218. 'Such is the penance called ant-shaped
- or narrow in the middle; but, if he perform the
- barley-shaped or broad in the middle, he must
- observe the same rule, beginning with the
- bright halfmonth, and keeping under com-
- mand his organs of action and fense.
 - 219. 'To perform the lunar penance of an

anchoret, he must eat only eight mouthfuls

of forest grains at noon for a whole month, tak-

ing care to subdue his mind.

220. 'If a Bråhmen eat only four mouthfuls

'at sunrise, and four at sunset, for a month,

keeping his organs controlled, he performs

* the lunar penance of children.

221. 'He, who, for a whole month, eats no

more than thrice eighty mouthfuls of wild

grains, as he happens by any means to meet

' with them, keeping his organs in subjection,

fhall attain the same abode with the regent of

the moon:

222. 'The eleven Rudras, the twelve A'di-

tyas, the eight Vasus, the Maruts, or genii of

the winds, and the seven great Rishis, have

performed this lunar penance as a fecurity

from all evil.

223. The oblation of clarified butter to fire

' must every day be made by the penitent him-

felf, accompanied with the mighty words

earth, sky, heaven; he must perfectly abstain

from injury to fentient creatures, from falfe-

hood, from wrath, and from all crooked

ways.

224. Or, thrice each day and thrice each

f night for a month, the penitent may plunge

into water clothed in his mantle, and at no

time conversing with a woman, a Súdra, or an outcast.

225. LET him be always in motion, fitting

and rifing alternately, or, if unable to be thus

reftless, let him sleep low on the bare ground;

chaste as a student of the Veda, bearing the

facred zone and staff, showing reverence to

his preceptor, to the gods, and to priests;

226. Perpetually must he repeat the gáyatri,

and other pure texts to the best of his know-

· ledge: thus in all penances for absolution from

fin, must he vigilantly employ himself.

227. By these expiations are twiceborn

men absolved, whose offences are publickly

* known, and are mischievous by their example;

but for fins not publick, the affembly of priefts

" must award them penances, with holy texts

and oblations to fire.

228. By open confession, by repentance,

by devotion, and by reading the scripture, a

finner may be released from his guilt; or by

almsgiving, in case of his inability to perform

* the other acts of religion.

229. 'In proportion as a man, who has

committed a fin, shall truly and voluntarily

confess it, so far he is disengaged from that

offence, like a fnake from his flough;

230. And, in proportion as his heart fin-

- * cerely loathes his evil deed, fo far shall his
- ⁶ vital spirit be freed from the taint of it.
 - 231. 'If he commit fin, and actually repent,
- f that fin shall be removed from him; but if
- "he merely fay, "I will fin thus no more,"
- he can only be released by an actual absti-
- ' nence from guilt.
 - 232. 'Thus revolving in his mind the cer-
- tainty of retribution in a future state, let him
- be conftantly good in thoughts, words, and
- action.
 - 233. ' If he defire complete remission of any
- foul act which he has committed, either igno-
- rantly or knowingly, let him beware of com-
- f mitting it again: for the second fault bis pe-
- s nance must be doubled.
- 234. 'If, having performed any expiation,
- s he feel not a perfect fatisfaction of conscience,
- * let him repeat the same devout act, until his
- conscience be perfectly satisfied.
- 235. 'All the bliss of deities and of men is
- declared by fages, who discern the sense of
- the Véda, to have in devotion its cause, in de-
- votion its continuance, in devotion its full-
- f neis.
- 236. 'Devotion is equal to the performance of
- e all duties; it is divine knowledge in a Bráh-
- " men; it is defence of the people in a Cshatriya;
- 9 devotion is the business of trade and agriculture

in a Vaisya; devotion is dutiful service in a · Súdra.

237. 'Holy fages, with fubdued passions,

feeding only on fruit, roots, and air, by devo-

tion alone are enabled to furvey the three

worlds, terrestrial, ethereal, and celestial, peopled

with animal creatures, locomotive and fixed.

238. Perfect health, or unfailing medicines,

divine learning, and the various mantions of

deities, are acquired by devotion alone: their

· efficient cause is devotion.

239. Whatever is hard to be traversed, what-

ever is hard to be acquired, whatever is hard

to be vifited, whatever is hard to be perform-

ed, all this may be accomplished by true de-

votion; for the difficulty of devotion is the

greatest of all.

240. Even sinners in the highest degree,

and of course the other offenders, are absolved from guilt by austere devotion well-practifed.

241. ' Souls, that animate worms, and infects,

· ferpents, moths, beasts, birds, and vegetables,

attain heaven by the power of devotion.

242. Whatever fin has been conceived in

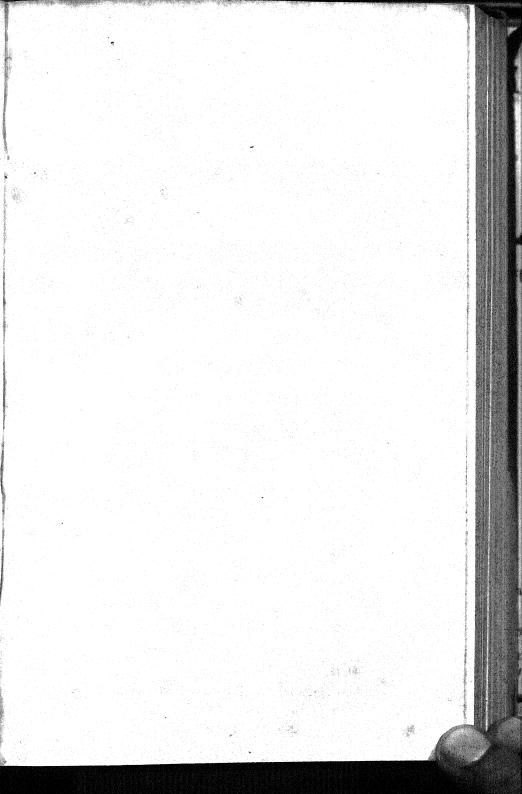
the hearts of men, uttered in their speech, or

committed in their bodily acts, they speedily

burn it all away by devotion, if they preserve

devotion as their best wealth.

243. Of a priest, whom devotion has puri-



وَجِيدِ كَجِيْدِاْ لِرْمِ لَهِنَ بَعَلَ الْمَالِكُ وَالْمِ لَهِنَ الْمَالِكُ الْمُعَمَّلُ إِلَى الْمُعَمَّلُ إِل

كجيلالعنق والفلي الإبيض كالصالب الرشبه بنال لظية و نضله دعنه والمعطل الذي لا حل عليه ومنله لعصل وقوله لبس بفاحسل ي لبي كوير المنظر واذا ظرف لقوله ليس باحش وَفَرْعَ بَرْنُ الْمَاتَى السُوَد فَاحِدِه

ع بزر المهن السود فاهيم آيُمنُ كَفِيْزِ الْلَغَيْ كَلَةِ الْمُتَّفِّكُمْ إِلَيْنَا الْلَغِيْ كُلِ

الفرع الشعر كنام والمئن والمتن ما عليف الصل وثياله مق العصب والليم والفاحس والشدولة السواد والثير والفروة السواد والثير أصلا لبناف والفنود والفروة المعل العدى وهر الشراخ والمئعث كل الذي ومد فل بعضا في معنى كنثر أن من العنكال والعنكول ومعرالشماخ وفيل المتعنك والعدائد لى المنا ذل المحدث ألى المناف المنا

الندآبرا لذ دآب واحدها عدم وستشرك ومرسك واصل الشنروا لفت كاعلي عبرجهة اكثر نها وقوله الي العدد بي ما فوقها والعفاص جمع عقصة وهرماجشخ المشوفية ل يخشأ لذوآب وهي سلطة معروف بهلزها فيها عض النسور في ند و بعضه فالذي فتل لعضه gullen eller I kge White to an and the state of the said being the with the second 1 The work of the second ated to the do

وَخِيدِ كِبُنِ لِرُمُ لَئِنَ مَعَاجِيْنَ وَلَا يُعَلَّلُهُ وَلَا يُعَلَّلُهُ كجيلالفنؤ والنلئ لابيهن لخا لعالباط نشبه وفي الظيمة و نف، معناه والمطل الذي لا حل عليه وشله عمل ود راسيفا- سناي لبركوم المتظروا داط لقوله لبس بناحش وَ وَمُ مَرَانُ اللَّهُ السُّود ق المد آيت كفيسر التعكلة المتعكل العن ع السر الذام والمن والمتنة هاع عاب اصلب وقياله مزالعمس واللحم والعاحم البدمة عاد والله كثيراصلالنار والعبردوا ففروا العدة وحرالتراج والمنعث كالذي مع خلاعمة وبعص كمرًا له من العنكال والسكول وهواللمراخ وجها المتعنكم هوالمتدلى النأزل المرغث فالم عذابها سُنَتَن داد آدالي مَتِنْ الْسِعَاطَ فَكُمْتَى وَمُهُكِ الناآرا لذوآب راحدهاعدى وسنسروك وفوع وا منياً الشنري لعشار على عيرجهة اكترنها وقوله ال الباد لي ماذ فها والعناص جم عفصة وهرساهم

السوفعدل كالزدآب وهى سطة معاوف بربهلنا

ويهانفط لشروبنر دبرضه فالذى فللبضه

fied, the divine spirits accept the facrifices, and

' grant the defires with ample increase.

244. 'Even BRAHMA', lord of creatures, by

devotion, enacted this code of laws; and the

' fages by devotion acquired a knowledge of the

· Védas.

245. Thus the gods themselves, observing

in this universe the incomparable power of

devotion, have proclaimed aloud the tran-

' fcendent excellence of pious aufterity.

246. 'By reading each day as much as pos-

fible of the Véda, by performing the five great

facraments, and by forgiving all injuries, even

fins of the highest degree shall be soon ef-

faced:

247. ' As fire confumes in an instant with his

· bright flame the wood, that has been placed

on it, thus, with the flame of knowledge, a

' Brahmen, who understands the Véda, consumes

all fin.

248. 'Thus has been declared, according to

4 law, the mode of atoning for open fins: now

elearn the mode of obtaining absolution for

fecret_offences.

249. 'SIXTEEN suppressions of the breath,

" while the holiest of texts is repeated with the

three mighty words, and the triliteral fyllable,

' continued each day for a month, abfolve even

- * the flayer of a Bråhmen from his hidden * faults.
- 250. 'Even a drinker of spirituous liquors
- is absolved by repeating each day the text apa
- used by the sage CAUTSA, or that beginning
- with preti used by VASISHT'HA, or that called
- " mábitra, or that, of which the first word is " suddhavatvab.
- 251. By repeating each day for a month the
- text ásyavámíya, or the hymn Sivasancalpa,
- the stealer of gold from a priest becomes in-
- fantly pure.
 - 252. 'He, who has violated the bed of his
- preceptor, is cleared from fecret faults by re-
- e peating sixteen times a day the text havishyan-
- tiya, or that beginning with na tamanhah, or
- by revolving in his mind the fixteen holy verses,
- called Paurusha.
- 253. 'The man, who defires to expiate his
- · hidden fins, great and small, must repeat once
- 'a day for a year the text ava, or the text yatcinchida.
 - 254. 'He, who has accepted an illegal pre-
- fent, or eaten prohibited food, may be cleanfed
- in three days by repeating the text taratfa-
- · mandiya.
 - 255. 'Though he have committed many
- fecret fins, he shall be purified by repeating

for a month the text fomáraudra or the three

texts aryamna, while he bathes in a facred

ftream.

256. 'A grievous offender must repeat the

feven verses, beginning with INDRA, for half

'a year; and he, who has defiled water with

any impurity, must sit a whole year subsisting

by alms.

257. A twiceborn man, who shall offer

clarified butter for a year, with eight texts ap-

' propriated to eight feveral oblations, or with

the text na mé, shall efface a sin even of an

extremely high degree.

258. 'He, who had committed a crime of

the first degree, shall be absolved, if he attend

a herd of kine for a year, mortify his organs,

e and continually repeat the texts beginning

' with pávamáni, living solely on food given in

charity:

259. 'Or, if he thrice repeat a Sanhitá of

the Védas, or a large portion of them with all

the mantras and bráhmanas, dwelling in a fo-

rest with subdued organs, and purified by three

oparácas, he shall be set free from all sins how

6 heinous soever.

260. 'Or he shall be released from all deadly

fins, if he fast three days, with his members

mortified, and twice a day plunge into water,

thrice repeating the text aghamarshana:

261. As the facrifice of a horse, the king

- of facrifices, removes all fins, thus the text
- · aghamarshana deftroys all offences.
 - 262. A priest who should retain in his me-
- e mory the whole Rigvéda, would be abfolved
- from guilt, even if he had flain the inhabitants
- of the three worlds, and had eaten food from
- the foulest hands.
- 263. By thrice repeating the mantras and
- brábmanas of the Rich, or those of the Yajush,
- or those of the Sáman, with the upanishads, he
- fhall perfectly be cleanfed from every possible
- taint:
 - 264. As a clod of earth, cast into a great
- · lake, finks in it, thus is every finful act fub-
- ' merged in the triple Vėda.
 - 265. The divisions of the Rich, the several
- branches of the Yajush, and the manifold
- ftrains of the Saman must be considered as
- forming the triple Véda: he knows the Véda,
- who knows them collectively.
- 266. The primary triliteral fyllable, in
- which the three Védas themselves are com-
- ' prised, must be kept secret, as another triple
- "Véda: he knows the Veda, who distinctly
- ' knows the mystick sense of that word.'

On Transmigration and final Beatitude.

- 1. O THOU, who art free from fin, faid the devout fages, thou hast declared the whole fystem of duties ordained for the four classes of men: explain to us now, from the first principles, the ultimate retribution for their deeds.
- 2. Bhrigu, whose heart was the pure essence of virtue, who proceeded from Menu himself, thus addressed the great sages: 'Hear the infallible rules for the fruit of deeds in this universe.
- 3. ACTION, either mental, verbal, or coroperal, bears good or evil fruit, as itself is good
 or evil; and from the actions of men proceed
- their various transmigrations in the highest,
- the mean, and the lowest degree:
- 4. 6 Of that threefold action, connected with
- bodily functions, disposed in three classes, and
- confisting of ten orders, be it known in this
- world, that the heart is the instigator.

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- 5. Devising means to appropriate the wealth of other men, resolving on any forbid-
- den deed, and conceiving notions of atheism
- or materialism, are the three bad acts of the mind:
- 6. 'Scurrilous language, falsehood, indiscri-'minate backbiting, and useless tattle, are the 'four bad acts of the tongue:
- 7. 'Taking effects not given, hurting sentient creatures without the sanction of law, and
- criminal intercourse with the wife of another,
- are the three bad acts of the body; and all the
- ten have their opposites, which are good in an
- equal degree.
 - 8. A rational creature has a reward or
- 'a punishment for mental acts, in his mind;
- for verbal acts, in his organs of speech; for
- ' corporeal acts, in his bodily frame.
 - 9. 'For finful acts mostly corporeal, a man
- 's shall assume after death a vegetable or mi-
- eneral form; for such acts mostly verbal, the
- form of a bird or a beast; for acts mostly
- ' mental, the lowest of human conditions:
 - 10. 'He, whose firm understanding obtains
- a command over his words, a command over
- 6 his thoughts, and a command over his whole
- body, may justly be called a tridandi, or triple
- commander; not a mere anchoret, who bears
- three visible staves.

11. 'The man, who exerts this triple self-

- command with respect to all animated crea-
- tures, wholly fubduing both lust and wrath,
- 's shall by those means attain beatitude.
 - 12. 'THAT substance, which gives a power
- of motion to the body, the wife call cshétra-
- ' jnya, or jivátman, the vital spirit; and that
- · body, which thence derives active functions,
- they name bhutatman, or composed of elements:
 - 13. 'Another internal spirit, called mahat,
- or the great foul, attends the birth of all crea-
- tures imbodied, and thence in all mortal
- forms is conveyed a perception either pleasing
- or painful.
- 14. 'Those two, the vital spirit and reason-
- able foul, are closely united with five ele-
- ' ments, but connected with the supreme spirit,
- or divine effence, which pervades all beings
- ' high and low:
- 15. 'From the substance of that Supreme
- 'Spirit are diffused, like Sparks from fire, innu-
- " merable vital spirits, which perpetually give
- 6 motion to creatures exalted and base.
- 16. 'By the vital fouls of those men, who
- have committed fins in the body reduced to
- ' ashes, another body, composed of nerves with
- ' five sensations, in order to be susceptible of
- torment, shall certainly be assumed after
- death;

17. And, being intimately united with those minute nervous particles, according to their distribution, they shall feel, in that new body, the pangs inslicted in each case by the sentence of YAMA.

18. 'When the vital foul has gathered the fruit of fins, which arise from a love of

fenfual pleasure, but must produce misery,

and, when its taint has thus been removed, it

* approaches again those two most effulgent

effences the intellectual foul and the divine spirit:

19. 'They two, closely conjoined, examine

without remission the virtues and vices of that

fensitive soul, according to its union with

which it acquires pleasure or pain in the pre-

fent and future worlds.

20. ' If the vital spirit had practised virtue

for the most part and vice in a small degree,

'it enjoys delight in celestial abodes, clothed

with a body formed of pure elementary par-

f ticles;

- 21. 'But, if it had generally been addicted

to vice, and feldom attended to virtue, then

fhall it be deferted by those pure elements,

and, baving a coarfer body of fensible nerves, it

feels the pains to which YAMA shall doom it:

22. Having endured those torments ac-

cording to the fentence of YAMA, and its

' taint being almost removed, it again reaches

- those five pure elements in the order of their natural distribution.
- 23. 'Let each man, confidering with his 'intellectual powers these migrations of the 'soul according to its virtue or vice, into a 'magin of his or pain continually say his heart
- ' region of bliss or pain, continually fix his heart
 on virtue.
- 24. 'BE it known, that the three qualities of the rational foul are a tendency to goodness, to passion, and to darkness; and, endued with
- one or more of them, it remains incessantly attached to all these created substances:
- 25. 'When any one of the three qualities predominates in a mortal frame, it renders the imbodied spirit eminently distinguished for that quality.
- 26. 'Goodness is declared to be true know'ledge; darkness, gross ignorance; passion, an
 'emotion of desire or aversion: such is the
 'compendious description of those qualities,
 'which attend all souls.
- 27. 'When a man perceives in the reason'able soul a disposition tending to virtuous
 'love, unclouded with any malignant passion,
 'clear as the purest light, let him recognise it
 'as the quality of goodness:
- 28. A temper of mind, which gives uneasiness and produces disaffection, let him consider as the adverse quality of passion, ever agitating imbodied spirits:

29. 'That indistinct, inconceivable, unac-

countable disposition of a mind naturally

fenfual, and clouded with infatuation, let

him know to be the quality of darkness.

30. 'Now will I declare at large the va-

rious acts, in the highest, middle, and lowest

degrees, which proceed from those three dif-

" positions of mind.

31. 'Study of scripture, austere devotion,

facred knowledge, corporeal purity, com-

mand over the organs, performance of duties,

and meditation on the divine spirit, accom-

' pany the good quality of the foul:

32. Interested motives for acts of religion or

· morality, perturbation of mind on flight oc-

casions, commission of acts forbidden by law,

and habitual indulgence in felfish gratifica-

tions, are attendant on the quality of paf-

fion:

33. 'Covetousness, indolence, avarice, detraction, atheism, omission of prescribed acts,

a habit of foliciting favours, and inattention

to necessary business, belong to the dark

' quality.

34. 'Of those three qualities, as they appear

in the three times, past, present and future,

the following in order from the lowest may be

' considered as a short but certain criterion.

35. Let the wife confider, as belonging to the quality of darkness, every act which a

man is ashamed of having done, of doing, or

of going to do:

36. Let them confider, as proceeding from the quality of passion, every act, by which a man feeks exaltation and celebrity in this world, though he may not be much afflicted,

if he fail of attaining his object:

- 37. To the quality of goodness belongs every act, by which he hopes to acquire di-' vine knowledge, which he is never ashamed of doing and which brings placed joy to his conscience.
- 38. Of the dark quality, as described, the principal object is pleasure; of the passionate, worldly prosperity; but of the good quality, the chief object is virtue: the last mentioned · objects are superiour in dignity.

39. Such transmigrations, as the foul procures in this universe by each of those qualities, I now will declare in order fuccinctly.

- 40. 'Souls, endued with goodness, attain always the state of deities; those filled with ' ambitious passions, the condition of men; and those immersed in darkness, the nature of beasts: this is the triple order of transmigraf tion.
- 41. 'Each of those three transmigrations, caused by the several qualities, must also be ' considered as threefold, the lowest, the mean,

and the highest, according to as many diflinctions of acts and of knowledge.

42. 'Vegetable and mineral substances, worms, insects, and reptiles, some very mi-

nute, fome rather larger, fish, snakes, tor-

toises, cattle, shakals, are the lowest forms, to

which the dark quality leads:

43. 'Elephants, horses, men of the servile class, and contemptible Mléch'has, or barbari'ans, lions, tigers, and boars, are the mean

flates procured by the quality of darkness:

44. Dancers and fingers, birds and deceit-

ful men, giants and bloodthirsty savages, are

the highest conditions, to which the dark

equality can ascend.

45. 'J'hallas, or cudgelplayers, Mallas, or

boxers and wrestlers, Natas, or actors, those

who teach the use of weapons, and those who

sare addicted to gaming or drinking, are the

· lowest forms occasioned by the passionate

• quality:

46. 'Kings, men of the fighting class, do-

mestick priests of kings, and men skilled in the

war of controversy, are the middle states

f caused by the quality of passion:

47. 'Gandharvas, or aerial musicians, Guhy-

e acas and Yacsbas, or servants and companions

of Cuve'RA, genii attending fuperiour gods,

* as the Vidyáharas and others, together with

various companies of Apfarases or nymphs,

are the highest of those forms, which the

quality of passion attains.

48. 'Hermits, religious mendicants, other

6 Bráhmens, such orders of demigods as are

wafted in airy cars, genii of the figns and

Innar mansions, and Daityas, or the offspring

of DITI, are the lowest of states procured by

the quality of goodness:

49. Sacrificers, holy sages, deities of the

' lower heaven, genii of the Vėdas, regents of

ftars not in the paths of the fun and moon, di-

vinities of years, Pitris or progenitors of

' mankind, and the demigods, named Sádhyas,

are the middle forms, to which the good

' quality conveys all spirits moderately endued

s with it:

50. 'BRAHMA' with four faces, creators of

worlds under him, as MARI'CHI and others, the

genius of virtue, the divinities prefiding over

(two principles of nature in the philosophy of

· CAPILA) mahat, or the mighty, and avyacta,

or unperceived, are the highest conditions, to

' which, by the good quality, fouls are exalted,

51. 'This triple fystem of transmigrations,

in which each class has three orders, accord-

ing to actions of three kinds, and which com-

· prises all animated beings, has been revealed

in its full extent:

52. 'Thus, by indulging the fenfual appe-

tites, and by neglecting the performance of

duties, the basest of men, ignorant of sacred

expiations, assume the basest forms.

53: 'WHAT particular bodies the vital spirit

enters in this world, and in consequence of

what fins here committed, now hear at large

and in order.

54. 'Sinners in the first degree, having ' passed through terrible regions of torture for

a great number of years, are condemned to

the following births at the close of that period

to efface all remains of their sin.

55. 'The slayer of a Brabmen must enter · according to the circumstances of his crime the

body of a dog, a boar, an ass, a camel, a bull,

a goat, a sheep, a stag, a bird, a Chandála, or a

· Puccasa.

56. 'A priest, who has drunk spirituous 'liquor, shall migrate into the form of a

' fmaller or larger worm or insect, of a moth,

of a fly feeding on ordure, or of some raven-

ous animal.

57. 'He, who steals the gold of a priest, ' shall pass a thousand times into the bodies of

fpiders, of fnakes and cameleons, of crocodiles

' and other aquatick monsters, or of mischievous

blood fucking demons.

58. 'He, who violates the bed of his natural

" or spiritual father, migrates a hundred times

into the forms of graffes, of shrubs with

crowded stems, or of creeping and twining

e plants, of vultures and other carnivorous ani-

e mals, of lions and other beafts with sharp teeth,

or of tigers and other cruel brutes.

59. 'They who hurt any fentient beings,

are born cats and other eaters of raw flesh;

they, who taste what ought not to be tasted,

maggots or small flies; they, who steal ordi-

e nary things, devourers of each other: they

who embrace very low women, become rest-

· less ghosts.

60. He, who has held intercourse with

degraded men, or been criminally connected

with the wife of another, or stolen common

' things from a priest, shall be changed into a

' spirit, called Brahmarácshasa.

61. 'The wretch, who through covetouf-

e ness has stolen rubies or other gems, pearls, or

coral, or precious things of which there are

" many forts, shall be born in the tribe of gold-

· smiths, or among birds called hémacaras, or

goldmakers.

62. 'If a man steal grain in the husk, he

's shall be born a rat; if a yellow mixed metal, a gander; if water, a plava, or diver; if

honey, a great stinging gnat; if milk, a crow;

' if expressed juice, a dog; if clarified butter, an

' ichneumon weasel;

63. 'If he steal sleshmeat, a vulture; if any fort of fat, the water-bird madgu; if oil, a blatta, or oildrinking beetle; if salt, a cicada

or cricket; if curds, the bird valaca; 64. 'If filken clothes, the bird of

64. 'If filken clothes, the bird tittiri; if 'woven flax, a frog; if cotton cloth, the 'waterbird crauncha; if a cow, the lizard

gódhá; if molasses, the bird vágguda;

65. 'If exquisite perfumes, a muskrat; if pot-

herbs, a peacock; if dressed grain in any of its various forms, a porcupine; if raw grain,

a hedgehog;

66. 'If he steal fire, the bird vaca; if a household utesinl, an ichneumon-fly; if dyed cloth, the bird chacora;

67. 'If a deer or an elephant, he shall be born a wolf; if a horse, a tiger; if roots or fruit, an ape; if a woman, a bear; if water from a jar, the bird chátaca; if carriages, a

camel; if small cattle, a goat.

68. 'That man, who defignedly takes away the property of another, or eats any holy cakes not first presented to the deity at a solution rite, shall inevitably fink to the con-

' dition of a brute.

69. 'Women, who have committed similar thefts, incur a similar taint, and shall be paired with those male beasts in the form of their semales.

70. 'IF any of the four classes omit, without

- urgent necessity, the performance of their
- ' feveral duties, they shall migrate into finful
- bodies, and become flaves to their foes.
 - 71. 'Should a Brahmen omit his peculiar
- " duty, he shall be changed into a demon called
- 'Ulcámuc'ha or with a mouth like a firebrand,
- who devours what has been vomited; a C/ka-
- ' triya, into a demon called Cataputana, who
- feeds on ordure and carrion;
 - 72. ' A Vaifya, into an evil being called
- · Maitrácshajyótica, who eats purulent carcasses;
- and a Súdra, who neglects his occupations,
- becomes a foul imbodied spirit called Chailá-
- ' faca, who feeds on lice.
 - 73. 'As far as vital fouls, addicted to fen-
- ' fuality, indulge themselves in forbidden plea-
- fures, even to the same degree shall the acute-
- e ness of their senses be raised in their future
- bodies, that they may endure analogous pains;
 - 74. 'And, in consequence of their folly, they
- shall be doomed as often as they repeat their
- ' criminal acts, to pains more and more intense
- in despicable forms on this earth.
- 75. 'They shall first have a sensation of
- 'agony in Tamisra or utter darkness, and in
- other feats of horrour; in Asipatravana, or
- the swordleaved forest, and in different places
- of binding fast and of rending:
 - 76. Multifarious tortures await them: they

- ' shall be mangled by ravens and owls, shall
- 'fwallow cakes boiling hot; shall walk over
- 'inflamed fands; and shall feel the pangs of
- being baked like the vessels of a potter:
 - 77. 'They shall assume the forms of beasts
- continually miserable, and suffer alternate as-
- flictions from extremities of cold and of heat,
- furrounded with terrours of various kinds:
- 78. 'More than once shall they lie in differ-
- ent wombs; and, after agonizing births, be
- condemned to fevere captivity, and to fervile
- * attendance on creatures like themselves:
 - 79. 'Then shall follow separations from kin-
- dred and friends, forced refidence with the
- wicked, painful gains and ruinous loffes of
- wealth; friendships hardly acquired and at
- · length changed into enmities,
 - 80. 'Old age without resource, diseases at-
- tended with anguish, pangs of innumerable
- forts, and, lastly, unconquerable death.
 - 81. With whatever disposition of mind a
- ' man shall perform in this life any act religious
- for moral, in a future body endued with the
- fame quality, shall he receive his retribution.
- 82. Thus has been revealed to you the fystem of punishments for evil deeds: next
- · learn those acts of a Brahmen, which lead to
- eternal bliss.
 - 83. 'Studying and comprehending the Véda,

- practifing pious austerities, acquiring divine
- 'knowledge of law and philosophy, command
- over the organs of fense and action, avoiding
- 'all injury to fentient creatures, and showing
- reverence to a natural and spiritual father, are
- ' the chief branches of duty which enfure final
- ' happiness.'
- 84. 'Among all those good acts performed
- ' in this world, faid the fages, is no fingle act
- ' held more powerful than the rest in leading
- 'men to beatitude?'
 - 85. 'OF all those duties, answered BHRIGU,
- ' the principal is to acquire from the Upanishads
- 'a true knowledge of one supreme GOD; that
- ' is the most exalted of all sciences, because it
- ensures immortality:
- 86. 'In this life, indeed, as well as the next,
- ' the study of the Véda, to acquire a knowledge
- ' of GOD, is held the most efficacious of those
- ' fix duties in procuring felicity to man;
 - 87. 'For in the knowledge and adoration of
- one GOD, which the Vėda teaches, all the
- ' rules of good conduct, beforementioned in order,
- ' are fully comprised.
 - 88. 'The ceremonial duty, prescribed by the
- Weda, is of two kinds; one connected with this
- ' world, and caufing prosperity on earth; the
- 'other abstracted from it, and procuring bliss
- in heaven.

- 1 89. A religious act proceeding from felfish
- views in this world, as a facrifice for rain, or
- in the next, as a pious oblation in hope of a fu-
- ture reward, is declared to be concrete and in-
- fterested; but an act performed with a know-
- e ledge of God, and without felf love, is called
- abstract and difinterested.
 - 90. 'He, who frequently performs interested
- rites, attains an equal station with the regents
- of the lower heaven; but he, who frequently
- ' performs difinterested acts of religion, becomes
- for ever exempt from a body composed of the
- five elements:
 - or. Equally perceiving the supreme soul
- in all beings and all beings in the fupreme
- foul, he facrifices his own spirit by fixing it on
- the spirit of GOD, and approaches the nature
- of that fole divinity, who shines by his own
- effulgence.
 - 92. 'Thus must the chief of the twiceborn,
- though he neglect the ceremonial rites men-
- 'tioned in the Sástras, be diligent alike in at-
- 'taining a knowledge of GoD and in repeating
- ' the Véda:
 - 93. Such is the advantageous privilege of
- those, who have a double birth from their na-
- tural mothers and from the gayatri their spiritual
- 'mother, especially of a Brahmen; since the
- twiceborn man by performing this duty but

'not otherwise, may soon acquire endless fe-

94. To patriarchs, to deities, and to mankind, the scripture is an eye giving constant

'light; nor could the Véda Sáftra have been

'made by human faculties; nor can it be mea-

fured by human reason unassisted by revealed

'glosses and comments: this is a sure proposition.

Such codes of law as are not grounded

on the Véda, and the various heterodox theo-

ries of men, produce no good fruit after death;

for they all are declared to have their basis on darkness.

96. All fystems, which are repugnant to

the Véda, must have been composed by mor-

tals, and shall soon perish: their modern date

f proves them vain and false.

97. 'The three worlds, the four classes of men, and their four distinct orders, with all that has been, all that is, and all that will be,

f are made known by the Véda:

98. The nature of found, of tangible and visible shape, of taste, and of odour, the fifth

object of sense, is clearly explained in the Vėda

'alone, together with the three qualities of

'mind, the births attended with them, and the

' acts which they occasion.

99. 'All creatures are sustained by the primeval Véda Sástra, which the wise therefore vol. vi.

' hold supreme, because it is the supreme source

of prosperity to this creature, man.

100. 'Command of armies, royal authority,

opower of inflicting punishment, and sovereign

dominion over all nations, he only well de-

ferves, who perfectly understands the Vėda

· Sástra.

101. As fire with augmented force burns

' up even humid trees, thus he, who well knows

the Véda, burns out the taint of fin, which has

' infected his foul.

102. 'He, who completely knows the fense

of the Vėda Sástra, while he remains in any

one of the four orders, approaches the divine

nature, even though he sojourn in this low

world.

103. 'They, who have read many books, are

' more exalted than fuch, as have feldom stu-

' died; they, who retain what they have read,

6 than forgetful readers; they, who fully under-

' stand, than such as only remember; and they,

'who perform their known duty, than fuch

' men, as barely know it.

104. Devotion and facred knowledge are

the best means by which a Brábmen can arrive

'at beatitude: by devotion he may destroy

' guilt; by facred knowledge he may acquire

' immortal glory.

105. 'Three modes of proof, ocular demon-

ftration, logical inference, and the authority

of those various books, which are deduced

from the Vėda, must be well understood by

that man, who feeks a distinct knowledge of

all his duties:

106. 'He alone comprehends the system of

duties religious and civil, who can reason, by rules of logic agreeable to the Véda, on the

egeneral heads of that fystem as revealed by

the holy fages.

107. 'These rules of conduct, which lead to

fupreme blifs, have been exactly and compre-

henfively declared: the more fecret learning

of this Mánava Sástra shall now be disclosed. 108. 'IF it be asked, how the law shall be

ascertained, when particular cases are not

' comprised under any of the general rules, the

' answer is this: "That, which well instructed

" Brahmens propound, shall be held incontestible

" law."

109. 'Well instructed Brahmens are they,

who can adduce ocular proof from the fcrip-

fure itself, having studied, as the law ordains,

the Vedas and their extended branches, or

⁴ Vėdángas, Mimánsa, Nyaya, Dhermasastra,

6 Puránas:

110. 'A point of law, before not expressly re-" vealed, which shall be decided by an assembly ' of ten fuch virtuous Bráhmens under one chief,

or, if ten be not procurable, of three such un-

der one president, let no man controvert.

III. 'The affembly of ten under a chief

either the king himself or a judge appointed by

' him, must consist of three, each of them pecu-

Iiarly conversant with one of the three Vėdas,

of a fourth skilled in the Nyáya, and a fifth

' in the Mimansa philosophy; of a fixth, who

has particularly studied the NiruEta; a seventh,

who has applied himself most assiduously to

the Dhermafástra; and of three universal scho-

· lars, who are in the three first orders.

112. 'One, who has chiefly studied the Rig-

wêda, a fecond, who principally knows the

Yajush, and a third best acquainted with the

· Saman, are the affembly of three under a head,

' who may remove all doubts both in law and

cafuistry.

113. Even the decision of one priest, if

" more cannot be affembled, who perfectly knows

' the principles of the Védas, must be considered

' as law of the highest authority; not the opinion

of myriads, who have no facred knowledge.

114. 'Many thousands of Brahmens cannot

form a legal affembly for the decision of con-

' tests, if they have not performed the duties of

a regular studentship, are unacquainted with

e scriptural texts, and subsist only by the name

of their facerdotal class.

115. 'The fin of that man, to whom dunces,

' pervaded by the quality of darkness, propound

the law, of which they are themselves igno-

' rant, shall pass, increased a hundredfold, to

' the wretches who propound it.

116. 'This comprehensive system of duties,

' the chief cause of ultimate felicity, has been

' declared to you; and the Brahmen, who never

departs from it, shall attain a superiour state

6 above.

117. 'Thus did the allwise Menu, who 'possesses extensive dominion, and blazes with

heavenly splendour, disclose to me, from his

benevolence to mankind, this transcendant

fystem of law, which must be kept devoutly

6 concealed from persons unfit to receive it.

118. 'LET every Brahmen with fixed attention confider all nature, both visible and invi-

fible, as existing in the divine spirit; for,

when he contemplates the boundless universe

existing in the divine spirit, he cannot give

6 his heart to iniquity:

119. 'The divine spirit alone is the whole

affemblage of gods; all worlds are feated in the divine spirit, and the divine spirit no doubt

produces by a chain of causes and effects consist-

ent with free will, the connected series of acts

performed by imbodied fouls.

120. 'He may contemplate the fubtil ether

- in the cavities of his body; the air in his
- ' muscular motion and sensitive nerves; the su-
- ' preme folar and igneous light, in his digestive
- heat and his vifual organs; in his corporeal
- fluids, water; in the terrene parts of his fa-
- brick, earth;
- 121. In his heart, the moon; in his audi-
- ' tory nerves, the guardians of eight regions;
- in his progressive motion, VISHNU; in his
- 'muscular force, HARA; in his organs of
- ' fpeech, Agni; in excretion, MITRA; in pro-
- creation, BRAHMA':
- 122. 'But he must consider the supreme
- ' omnipresent intelligence as the sovereign lord
- of them all, by whose energy alone they exist; a
- ' spirit, by no means the object of any sense, which
- can only be conceived by a mind wholly ab-
- ftracted from matter, and as it were flumbering;
- but which for the purpose of assisting his medi-
- e tation, he may imagine more subtil than the
- ' finest conceivable essence, and more bright
- ' than the purest gold.
- 123. Him some adore as transcendently
- e present in elementary fire; others, in Menu,
- ' lord of creatures, or an immediate agent in the
- " creation; fome, as more distinctly present in
- INDRA, regent of the clouds and the atmosphere;
- others, in pure air; others, as the most High
- Eternal Spirit.

124. 'It is He, who, pervading all beings in

five elemental forms, causes them by the

gradations of birth, growth, and dissolution,

' to revolve in this world, until they deserve beati-

6 tude, like the wheels of a car.

125. 'Thus the man, who perceives in his

own foul the supreme foul present in all crea-

tures, acquires equanimity toward them all,

and shall be absorbed at last in the highest es-

fence, even that of the Almighty himself.'

126. Here ended the facred instructor; and every twiceborn man, who, attentively reading this *Mánava Sástra* promulgated by Bhrigu, shall become habitually virtuous, will attain the beatitude which he seeks.

GENERAL NOTE.

THE learned Hindus are unanimously of opinion, that many laws enacted by Menu, their oldest reputed legislator, were confined to the three first ages of the world, and have no force in the present age, in which a few of them are certainly obsolete; and they ground their opinion on the following texts, which are collected in a work entitled Mandana ratna pradipa:

I. CRATU: In the Cali age a fon must not be begotten on a widow by the brother of the deceased husband; nor must a damsel, once given away in marriage, be given a second time; nor must a bull be offered in a facrifice; nor must a waterpot be carried by a student in theology.

II. VRIHASPATI: 1. Appointments of kinfmen to beget children on widows, or married women, when the husbands are deceased or impotent,
are mentioned by the fage Menu, but forbidden by himself with a view to the order of the

four ages: no fuch act can be legally done in this age by any others than the bufband.

2. In the first and second ages men were endued with true piety and sound knowledge; so they were in the third age; but in the fourth, a diminution of their moral and intellectual powers was ordained by their Creator:

3. Thus were fons of many different forts made by ancient fages, but fuch cannot now be adopted by men deftitute of those eminent powers.

III. PARA'SARA: I. A man, who has held intercourse with a deadly sinner, must abandon his country in the first age; he must leave his town, in the second; his family, in the third age; but in the fourth he needs only desert the offender.

2. In the first age, he is degraded by mere conversation with a degraded man; in the second, by touching him; in the third, by receiving food from him; but in the fourth, the sinner alone bears his guilt.

IV. NA'RADA: The procreation of a fon by a brother of the deceased, the slaughter of cattle in the entertainment of a guest, the repast on sleshmeat at funeral obsequies, and the order of a hermit are forbidden or obsolete in the fourth age.

V. A'ditya purána: 1. What was a duty in the

first age must not in all cases be done in the fourth; since, in the Cali yuga, both men and women are addicted to sin:

- 2. Such are a studentship continued for a very long time, and the necessity of carrying a waterpot, marriage with a paternal kinswoman, or with a near maternal relation, and the sacrifice of a bull,
- 3. Or of a man, or of a horse: and all spirituous liquor must in the Cali age be avoided by twiceborn men; so must a second gift of a married young woman, whose busband has died before consummation, and the larger portion of an eldest brother, and procreation on a brother's widow or wise.
- VI. Smriti: 1. The appointment of a man to beget a fon on the widow of his brother; the gift of a young married woman to another bridegroom, if her hufband should die while she remains a virgin;
- 2. The marriage of twiceborn men with damfels not of the same class; the slaughter, in a religious war, of *Brahmens*, who are assailants with intent to kill;
- 3. Any intercourse with a twiceborn man, who has passed the sea in a ship, even though he have performed an expiation: performances of sacrifices for all sorts of men; and the necessity of carrying a waterpot;

- 4. Walking on a pilgrimage till the pilgrim die; and the slaughter of a bull at a facrifice; the acceptance of spirituous liquor, even at the ceremony called Sautrámani;
- 5. Receiving what has been licked off, at an oblation to fire, from the pot of clarified butter; entrance into the third order, or that of a hermit, though ordained for the first ages;
- 6. The diminution of crimes in proportion to the religious acts and facred knowledge of the offenders; the rule of expiation for a Bráhmen extending to death;
- 7. The fin of holding any intercourse with finners; the secret expiation of any great crimes except thest; the slaughter of cattle in honour of eminent guests or of ancestors;
- 8. The filiation of any but a fon legally begotten or given in adoption by his parents; the defertion of a lawful wife for any offence less than actual adultery:
- 9. These parts of ancient law were abrogated by wise legislators, as the cases arose at the beginning of the Cali age, with an intent of securing mankind from evil.

On the preceding texts it must be remarked, that none of them, except that of VRIHASPATI, are cited by Cullu'ca, who never seems to have considered any other laws of Menu as restrained to the three first ages; that the Smriti,

or facred code, is quoted without the name of the legislator; and that the prohibition, in any age, of felf-defence, even against Bráhmens, is repugnant to a text of Sumantu, to the precept and example of Crishna himself, according to the Mahábhárat, and even to a sentence in the Véda, by which every man is commanded to defend his own life from all violent aggreffors.

THE Institutes of Hindu Law have been very correctly printed, and the whole impression has just been fent to the Governor and Council, who will not fail to transmit copies for the King's library, for yourfelf, and for the Directors. If I had obtained his Majesty's leave to refign my office, nothing would now keep me here, but the Digest of Indian Laws, consisting of nine large volumes, two of which remain to be collated and studied with the learned Bráhmen, who assists me: he is old and infirm; but, should he be able to attend me another year. or two years at the very ut nost, the whole work will be finished, and I shall copy it during my voyage, if the King shall graciously permit me to leave India.

I, therefore, intreat you, Sir, to lay before his Majesty, my humble supplication for his gracious permission to resign my judgeship in the year 1795, or (if the Digest should not then be completed) in 1796; it being my anxious wish to pass the remainder of my life in studious retirement, though devoted, as I ever have been,

to the fervice of my King and my Country, and of that recorded Constitution, which is the basis of our national glory and felicity.

I have the honour to be, Sir,
your very obedient
humble Servant.
The Right Hon. Henry Dundas, Efg.

THE

MAHOMEDAN LAW

OF

SUCCESSION

TO

THE PROPERTY OF INTESTATES

IN

ARABICK,

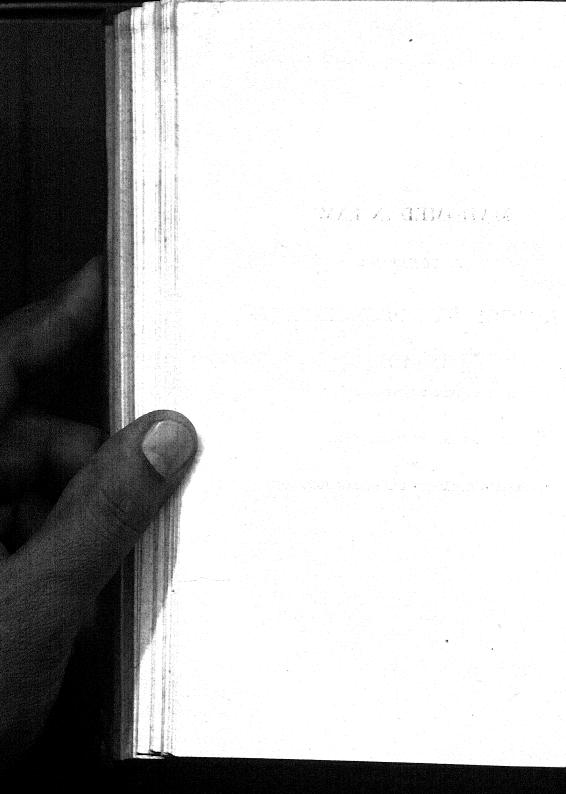
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FROM

AN ANCIENT MANUSCRIPT:

WITH

& VERBAL TRANSLATION, AND EXPLANATORY NOTES.



PREFACE.

NOTHING more seems necessary, in order to explain the object of the following work, than barely to cite the late statute concerning the administration of justice in BENGAL; by the feventeenth section of which it is enacted, " That " the Supreme Court of Judicature at Fort Wil-" liam shall have full power to hear and deter-" mine all manner of actions and fuits against " the inhabitants of Calcutta, provided that " their inheritance and succession to lands, rents, " and goods, and all matters of contract and " dealing between party and party, shall be " determined, in the case of Mahomedans, by " the laws and usages of MAHOMEDANS, and, where only one of the parties shall be a Ma-"homedan, by the laws and usages of the de-" fendant:" by the twenty-first section, the provincial courts of Adálet, or Justice, are expressly recognised, and the powers of the governor and council, as the Sedr Adálet, in determining civil VOL. VI.

causes on appeals from those courts, are fully established in conformity to the old Mogul constitution.

But it may naturally be asked, how the judges of the Supreme Court, the provincial councils and council general, in *India*, or the great court of appeal in this kingdom, can justly exercise their several powers in suits between *Mahomedan* parties, without being at all acquainted with the law, by which they are bound to decide. Perpetual references to native lawyers must always be inconvenient and precarious; since the solidity of their answers must depend on their integrity, as well as their learning; and at best, if they be neither influenced nor ignorant, the court will not in truth *bear and determine* the cause, but merely pronounce judgement on the report of other men.

For these reasons it appears indubitable, that a knowledge of Mahomedan jurisprudence (I say nothing here of the Hindú learning,) and consequently of the languages used by Mahomedan writers, are essential to a complete administration of justice in our Asiatick territories; a knowledge I mean, though not equal to that of the MUFTI at Constantinople, yet sufficient for the purpose of keeping a check over the native counsellors, of understanding and examining their opinion, and of rejecting or adopting it, as

it may be opposed or supported by their books of allowed authority, to which they should constantly refer.

A confiderable number of those books have been brought to England by the curious in different ages, and are now reposited in our Academical libraries: in the Bodleian, especially, we have many treatises and dissertations in Arabick on wills, inberitances, contrasts, and other important heads; particularly in the fine collection made at Aleppo by the learned Pocock, from one of whose most valuable manuscripts (n. 33.) this little work has been traced through transparent paper, and engraved with such accuracy, that the plates must have equal authority in Asia with the original pages, which are near five hundred years old.

The author, a native of Alrahaba, in Mesopotamia, was himself an IMAM; and his decifions are, on that account, considered as binding by the sect of Ali, which the Indian, as well as the Persian, Mahomedans profess; but IBNO'LMOTAKANNA informs us, that he drew his knowledge from the sountain head, and has epitomised the system of Zaid, who was recommended by Mahomed himself as the surest interpreter of his laws, and who had been implicitly sollowed by Shafies, the sirst writer on Mahomedan jurisprudence, in the eighth cen-

tury of our era, and composer of the Oful, or Principles of law, with other tracts highly valued by the learned of his religion and country.

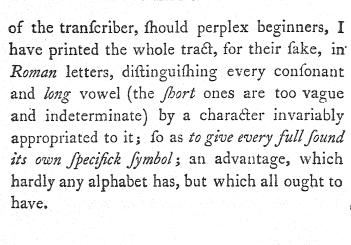
Hence it is certain, that the Bigyato'l báhith may be cited, as a book of authority, in all the Musleman courts; and the European reader must not be surprised, to see such a work written in a kind of loose metre, and even in rhyme: a lawtract in verse conveys, indeed, rather a ludicrous idea, fince poetry belongs to imagination, which law, whose province is pure reason, wholly excludes; but verse, as numberless instances prove, is not always poetry; and a regular measure is so considerable an aid to the memory, that, if the metrical abridgement of COKE's Reports were more accurate, and the couplets a little smother, every student should be advised to get it by heart. I may add, without enlarging upon the Agathyrsi and the Turdetani, who, as we are told by Aristotle and Strabo, had laws in verse of the remotest antiquity, that the Alco-RAN itself, the great source of Mahomedan law, is composed in sentences not only modulated with art, but often exactly rhymed; fo that in Afia this apology would have been needless. Verbal translations are generally naked and insipid, wholly destroying all the neatness and beauty of the original, yet retaining fo much of the foreign idiom and manner, as to appear

always uncouth, often ridiculous; but elegance, on a subject so delicate as law, must be facrificed without mercy to exactness; and for this reason I have rendered the Arabian treatise, line for line, and word for word, with a sidelity almost religiously scrupulous.

As it was never my intention to compose a perfect work upon the law of inheritances among the Mahomedans, it cannot be reasonably expected, that I should subjoin a commentary, or prefix a long discourse: very sew marginal notes were thought necessary; but, if the brevity of the original should make parts of it rather obscure, the British lawyers in India, for whose use chiefly this production was designed, will easily obtain a clear explanation both of the language and matter from native interpreters.

The fourth chapter of the Alcoran may throw light, if any be wanted, on the doctrine of the forudh or portions; and, as to the arithmetical part, it feems of little consequence, as our rules of three, and those for the reduction of fractions, are common and familiar to all.

The present publication will answer, I conceive, another purpose by no means unimportant; as it will habituate the student of eastern languages to the reading of old Arabian manuscripts; but, lest the hand-writing of the very learned Saad Al Sivási, for that was the name



Bigyah'o 'lbáhhithi ân jumali 'lmowárithi nadh"mo 'líhaíkhi álímámi álâálimi mowáffiki 'ldeíni ábeí âbdillahi mohhammedi 'bni âleí íbni 'lhhofaíni álrahhabiyyi álmârúfi bi 'bni 'l motakannah'i rahhamaho állaho taâálaí.



Bismi 'llahi álrahhmani álrahheími wabihi nestaêíno.

[1]

áwwalo má nestastihho 'lmekálá hidhicri hhamdi rabbiná taâálá. fálhhamdo lillahi álaí má ánâmá. hhamdán' bihi nejlúá âni 'lâini 'lâmá thomma áls'alwah'o bâdo wálfalámo âlaí nebiyyin' deínoho álíslamo mohhammedin' khátimi rusli rabbihi waálihi min bâdihi was ahhbihi wanefalo 'llaha liná 'líâánah'a feimá tawakhkhainá min álíbánaha ân medh-hebi 'límámi zaídi 'lfaradh'ei ídh cána dháca min áhammi 'lgaradh'i îlmán' biánna 'lîlmo áúfá má foêi' feíhi waáúlá má leho 'lâbdo doêí waánna hadhá 'lilma makhs'ús'on' bimá kad sháâa feihi înda culli 'lûlemá waánna zaídán' khus's'a lá mahhálah bimá hhabáho s'áhhibo 'lrifálah min kaúlihi feí fadh'lihi monabbehá

áfradh'acom zaídon wanáheíca behá facána áúlaí be-íttibáî 'ltábiî lá fiyyamá wakad nahháho 'lfháfiêí faháca feíhi álkaúla bi'leíjázi mobarraán' min kas'mah'i 'lálgázi áfbábo meíráthi 'lwaraí theláthah cullon yofeído rabbaho 'lwiráthah wahaí nicáhhon' waweláon' wanafab má bâdahonna lilmawáreíthi fabab.

[2]

wayamnaô 'lshakhs'a min álmeíráthi wáhhidah'on' min îlalin' theláthi rikkon' wakatlon' waákhtiláfo deíni faáfham falaífa 'lshacco cályakeíni wálwárithúno feí 'lrijáli âsharah ásmáwahom maríufah'on' mushtaharah álíbno wa'bno 'líbni mahmá nazalá wa'lábo wa'ljeddo leho wai'n âlá wálákho min áyyi 'ljeháti cáná kad ánzela 'llaho bihi 'lkoráná wábno 'lákhi 'lmodleí 'llaíhi bi'lábi fásmå mekálán' laífa bi'lmucadhdhabi wa' lâmmo wábno 'lâmmi min ábeíhi fáshcor ledheí 'leíjázi wáltanbeíhi wálzaújo wálmôtiko dhú 'lwelái fajumlah'o 'ldhucuri hawolai wálwáritháto cullohinna febô lam yâth'i óntheí gaírahonna 'líherô

binton' wabinto 'bnin' waómmon' mushfikah wajaddah'on' wazaújah'on' wamôtikah walakhto min áyyi 'ljeháti cánat fahadhihi îddatohá kad banat wáâlam bianna 'lirtha naúdani homá fardh on' watâs'eibon' âlaí ma kosimá fálfardho feí nas'si 'lcitábi sittah lá fardh'o feí 'lirthi siwáhá bittah nis fon' warubôn' thomma nis fo 'lrubî wálthultho wálsudso binas'si 'lsherî wálthultháni wahomá áltemámo fáhhfadh" facullo hhásidh'in' imámo

[3]

fálnisífo fardh'o khamfáh'in' áfrádi álzaújo wálónthaí min áláúládi wabinto 'libni înda fakdi 'lbinti wálákhto feí medh-hebi culli mufteí wabâdahá 'lákhto 'llati min álábi înda ánfirádihinna min moâs's'ibi wálrubô fardh'a 'lzaúji ín cána maâh min waladi 'lzaújah'i men kad menaâh wahú leculli zaújah'in' áú áctherá mâ âdami 'láúladi feîmá kadderá wálthomno lilzaújah i wálzaújáti má âlbeneína áú mâ álbenáti áú mâa áúládi 'lbeneíni fáâlemeí wábek le-ítkári 'ldurufi wáflemeí waálthúltháni lilbenáti jemâá

má záda ân wáhhidah'i fafemâá
wahúa cadháca lebenáti 'líbni
fáfham mekáleí fahma s'áfeí 'ldhihni
wahúa liákhtaíni femá yezeído
kadh'aí bihi 'láhhráro wálábeído
hadhá ídhá cunna liómmi waábi
áú liábi fáâmel bihadhá tos'ibi
wálthultho fardh'o 'lómmi hhaítho lá weled
wela mina 'lákhwah'i jemô waâded
cáthnaíni áú thintaíni áú theláthi
hocmo 'ldhucúri feíhi cálínáthi
wai'n yecun zaújon' waómon' waábo
fathultho 'lbákíyo lehá morattabo
wahacadhai mâ zaújah'in' fas'áidá
felá tecun mina 'lûlúmi káidá.

[4]

wálthultho liláthnaíni áú thintaíni min weledi 'lómmi bigaíri maíni wahacadhaí ín catharúa farádúa fema lehom feímá fiwáho zádo watastawaí 'línátho wáldhucúro feíhi camá kad áúdh'ahho 'lmesth'úro wálsudso fardh'o febâhin' mina 'lâded ábon' waómmon' thomma binto'bni wajedd wálókhto binto 'lábi thomma 'ljeddah waweledo 'lómmi temámo 'liddah fálábo yestahhikkoho mâa 'lweled wahacadhaí 'lómmo betenzeíli 'ls'emed

wahú lehá áydh'án' mâa 'láthnaíni min íkhwah'i 'lmaíti fakis hadhaíni wáljeddo mithlo 'lábi înda fakdihi feí jeza má yes'eíboho wameddihi illá ídhá cána honáca íkhwah licaunahom fei 'lkurbi wahu aswah wahhucmohim wahhucmoho feyáteí mocammela 'lbayána fei 'lhháláti wabinto 'líbni tákhodh álfudía ídhá cánat mâá 'lbinti mithálá yahhtadhaí wahacadhaí 'lókhto mâa 'lókhti 'llataí biálábawaíni vá ókhayyo ádlata fain teláwaí nefebo 'ljeddáti wacunna cullahonna wáritháti fálfudío bainahonna biálfawiyyah feí 'lkiímah'i 'lâádilah'i 'líherîyyah wacullo men ádlat bigaíri wárithi femá lehá hhadh"dh"on' mina 'lmawarithi.

[5]

wataskotho 'lbôdaí bidháti 'lkurbi feí 'lmedh-hebi 'láúlaí fakol leí hhasbeí wakad tenáhat kismah'o 'lforúdh'i bigaíri íshcáli welá gomúdh'i wahhokka án neshraâ feí 'ltâs'eíbi biculli kaúlin' mújizin' mus'eíbi facullo men áhhraza culla 'lmáli mina 'lkarábáti áú álmawáleí áú cána má yasdh'olo bâda 'lfardh'i leh fahú ákhú 'lâs'úbah'i 'lmosadh'dh'aleh

cálábi wáljeddi wajeddi 'ljeddi wálíbni înda kurbihi wálbôdi wálákhi wábni 'lákhi wáláâmámi wálfayyidi 'lmôtiki dheí 'línâámi wahacadhaí benúohom jemeíâán' facun lemá ádhcoroho femeílán' wamá ledheí 'lbôdi mâa 'lkareíbi feí 'lírthi min hhadh"dh"in' wela nes'eíbi wálákho wálámmo liómmin' waábi áúlaí mina 'Imodleí bithath'ri 'Inafabi wa'libno wálákho mâa 'lináthi voâs sibánahinna fei 'lmeiráthi walaisa fei 'lnisai th'urran' as'abah illá 'llataí mennat bi îtki 'lrakabah wálákhawáto ín yecun benáto fahonna bådahonna ås'abáto wa'ljeddo mahhjúbon' âni 'lmeíráthi bi'lábi feí áhhwálihi 'ltheláthi wahacadhaí 'bno 'libni bi'líbni felá tabig âni 'lhhacmi 'lfáhheihhi mâdilá

[6]

wataíkoth'o 'ljeddáto min culli jiheh bi 'lómmi fáhhfadh"-ho wakis má áíhbeheh wataíkoth'o 'líkhwah'o bi 'lbeneíná wabi 'lábi 'ládnaí camá ruweíná áú bibeneí 'lbeneína hhaítho cánúá fiyyáni feihi 'ljemâ wa'lwahhdáno wayaf dh'olo'bno 'lómmi bi 'lískáth'i bi'ljeddi fáhhfadh"-ho âlaí íhhtiyáth'i

wahi 'lbenáti wahenáti 'líbni facun bihhifdh"i 'lîlmi jiddan' mônei thomma benáto 'líbni yeskoth'na metai hháza 'lbenáto álthulthaína yá fetaí illá ídhá ás sabahonna áldhacaro min welidi 'líbni álaí má dhacarúá wahâdahonna 'lákhawáto 'llátaí yodleína bi'lkurbi min áljiháti ídhá ákhádna fardh'áhonna wáfiyá áskath na áúláda 'lábi 'lbawáciyá wai n yecun ákho lehonna hhádh'irán' áas abahonna bathínán' wadh'ahirán' walaifa ibno'lakhi bi'lmoassabi men mithlaho áú faúkaho feí 'lnafabi wai'n tajid zaúján' waommán' wárithá wai khwah'an' lilommi hhazua 'lthulotha waákhwah'an' áydh'án' liómmi waábi waástugrika 'lmálo bifardh'i 'lnos'obi fájálahomo cullohomo liómmi waáhhfib ábáhom hhajarán' feí 'lyammi wáksim álaí 'líkhwahi thultha 'ltaricah wahadhihi 'lmefelah'o 'lmufhtaracah

[7]

wálána nebdá bi'lladhaí áradná fei 'ljeddi wa'líkhwah i ídh waâdná faálik nahhaú má ákúlo 'lmiímaâá wájmâ hhawáíheí 'lcelamáti ájmaâá waalem biánna 'ljeddo dhú áhhwáli

ónbeica anhonna alai 'ltawálei fakáfimo 'líkhwah'i feíhonna ídhá lam yaôdi 'lkasmo âlashi bi'ládhai fatárah'an' yákhodho thulthán' cámilán' ín cána bi'lkismah'i anho názilán' ín lam yecun feihim dhawú fihámi fáknâ biáydh'áhheí âni ístifhámi watárah'an' yakhodho thultha 'lbákeí bâda dhaweí 'lforúdh'i wa'lárzáki hadhá ídhá má ádh'-hhati 'lmokásamah tenkos ho âni dháci bi'lmezáhhamah watárah an yákhodho fudfa 'lmáli walaisa anho nazilan' bihhali wahaú mâa 'línáthi înda 'lkafmi mithlo ákhin fei fahmihi wa'lhhocmi wáhhseb beneí 'lábi ledaí 'lidádi wárfodh' beneí 'lómmi mâa 'lájdádi wáhhcom álaí 'líkhwah'i báda 'láddi hhocmaca feihim înda fakdi 'ljeddi wálókhto lá fardh'o mâa 'ljeddi lehá feima âlá meselah'an' cammalehá zaújon' waómmon' wahomá temámoháfáálem fakhaíro ómmah in állámohá tôrafo yá sáhhi bi'lácdariyyah waheí bián tahhfadh'o-há hhariyyah

[8]

fayofradh'o 'lnis'fo lehá wa'lfudfo leh hhataí tâúli bi'lforúdh'i 'lmojmeleh thomma yaûúdáni ílaí 'lmokáfameh

camá madh'aí fáhhfadh"-ho wáshcor nádh"imeh wai'n torid marifah'a 'lhhifabi letentahaí feihi ilaí 'ls'awábi watarifo 'lkifmah'a wa'ltafs'eila watalim álsahheihha wa'lósúlá fástakhriji 'lós'úla feí 'lmesáyili walá tecun ân bhifdh"ibá bidháhili wahai idha fos's'ila feiha 'lkaulo thelethah'on' yedkholo feihá 'lâúlo wabadahá árbaah'on' temámo lá âúla yârúhá welá inthilámo fálfudfo min fittah'i ás-homin' terá wálthultho wa'lrubô min áthnaí âshará wálthumno in dh'omma ilaihi 'lfudfo faás loho 'ls'ádiko feihi 'lhhadio árbaâh'on' yatbaôhá îshrúná yârifohá 'lhhuſábo ájmaûúná fahadhihi 'Ithelethah'o 'lós'úlo in caththorat forudh'ohá tauúlo fatablogo 'lsittah'o âkda 'lâshareh fei s'úrah'in' màrufah'in' mustath'areh watalhhako 'llataí teleíhá fei 'láthar fei 'lâuli áfrádán' befebâh'i âfhar wa'lâdado 'lthálitho kad yaûúlo bithumnihi fáâmel himá ákúlo wa'lnis'fo wa'lbakei awi'lnis'fani ás lohomá fei hucmihom áthnání

[9]

wa'lthultho min thelethah'in' yecuno wa'lrubô min árbaâh'in' mesnúno wa'lthumno in cána famin themániyah fahadhihi haí 'lós'úlo 'lthániyah lá yedkholo 'lâúlo alaíhá fáálemi thomma ásloca 'ltás'-hheihi feihá wáksimi fai'n tecun min ás lihá tas ihhhho fatarco tath weili 'lhhifabi ribhho fáath'i cullán' fahmaho min ás'lhi mocammilán' aú âáyilán' min âúlihi wai'n terai 'lsihama laisa tankasim âlaí dhaweí 'lmeiráthi fátba má rufim wáthlob th'areika 'líkhtis'ári fei 'lâmal bi'ldh'arbi wa'lwafki yojánibca 'lzelel wárdod ílaí 'lwafki 'lladhaí yowáfiko wádh'ribho fei 'lás'li waánta 'lhhádiko in cána jinfán' wáhhidán' áú áctherá fahhfadh" wadâ ánca 'ljidála wa'lmirá wai'n terai 'lcathra âlai ájnási fai'nnahá fei 'lhucmi înda 'lnási tohhs aro fei árbaah in ákfámi yârifohá 'lmáhiro fei 'láhhcámi momáthilon' min bâdiho monáfiho wabadaho mowafikon' mos'ahhibo wa'lrábiô 'lmobáyino 'lmokhálifo yonbeica ân tafs'eilihinna 'lâárifo fakhodh mina 'lmomáthilaíni wáhhidá



wakhodh mina 'lmonásibaíni 'lzáyidá wakhodh jemeíâ 'lâdadi 'lmobáyini wadh'ribho feí 'ltháneí welá todáhini

[10]

wádh'rib jemeíâ 'lwafki feí 'lmowáfiki wásloc bidháca ánhaja 'lth'aráyiki wádh'ribho feí 'lás'li 'lladhaí taás's'ilá waáhhsí má ándh'amma wamá tahhas's alá waáksimho fa'lkasma ídhá s'ahheihho yârifoho 'láâjemo wa'lfas'eíhho fahadhihi mina 'lhhifábi jumalo yáteí álaí mithálihinna 'lâmalo min gairi tath'weilin' welá 'âtifáfi fáknâ bimá feíhinna fahú cáfi wai'n yemut ákharo kabla 'lkifmah fahhakkiki 'lsihámi wáárif kismah wájál leho mefalah'an' ókhraí lemá kad bayyana 'ltafs'eíla feímá koddimá wándh"or fai'n wáfakati 'ffihámo fakhodh hodeíta wafkohá temámo wádhribho áú jemeíâhá feí 'lfábikah ín lam yecun baínahomá mowáfakah fálás-homo 'lókhraí fafeí 'lfihámi todhírebo áû fei wafkihá temámi wacullo sahmin' fei jemeiî 'lthániyah yodh'rebo áú feí wafkihá âlániyah fahadhihi th'areikah'o 'lmonafakhah fárka bihá rutbah'a fadh'li shámikhah

wai'n yecun fei mustahhakki 'Imáli khonthaín' s'ahheihhon bayyana 'lishcáli fáksim âlaí 'lákalli wa'lyekeini tahhdh"a bihakki 'lkismah'i 'lmobeini wahacadhai hucmo dhawáti 'lhhamli yobnaí âlaí 'lyekeini wa'lákalli

[11]

wai'n yemut kaúmon' bihadmin' áú garak áú hhádithin ámma 'ljemeíâ ca'lhharak walam yecun yôlemo hhálo 'lfábiki falá yowarrath náfikon' min náfiki taôddohom cai'nnahom ájánibo wahacadhaí 'lráyyo 'lfadeído 'ls'áyibo wakad átaí 'lkaúlo âlaí má sheiná min kismah'i 'lmesráthi ca yebesná álaí th'areiki 'lramzi wa'lishárah molakhkhas'án' biáújezi 'libárah fa'lhhamdo lillahi âlaí 'ltemámi hhamdán' catheirán' tomma fei 'ldawámi wanafalo 'lâfwa âni 'ltaks'eiri wakhaíra má námolo feí 'lmes'eíri wagafra má cána mina 'ldhonúbi wafatra má cána mina 'lôyúbi waáfdh'alo 'ls'alwah'i wa'ltasleími âlaí 'lnebiyyi 'lmus'th'afaí 'lcereími mohhammedín' khaíri 'lánámi 'lâákibi waálihi 'lgurri dhaweí 'lmenákibi was ahhbihi 'láfádh'ili 'lábrári

áls'ifwah'i 'lámáthili 'lákhyári wahhashoná 'llaho wanîma 'lcáfeí dhú 'lîzzi wa'lkodrah'i wa'lálth'áfi

tummat wa'lhhamdo lillahi rabbi 'lâálemeíni was'alwátoho waselámoho alaí sayyidiná mohhammedin' álnebiyyi 'lómmiyi waâlaí álihi was'ahhbihi álth'ayyibeini álth'ahereini laílah'o 'ljemaâh liárbaâi liyáli khalauna min shewali sinnah áthneí áshari wasebá mávih i vetheki bi'llahi taâálaí fakhro 'lfábikánei

âfá 'llaho ânho.



THE DESIRED OBJECT OF THE INQUIRER CONCERNING ALL THE RULES OF INHERITANCE:

Composed by the learned Shaikh, the Imam

Mowaffiko'ddein, father of Abdalla,

Mohammed, son of Ali, son of Hosain,

Al Rahabi, commonly called Ibno'l

Motakanna, May God be merciful to him!



In the name of God, the Clement, the Merciful; and from Him we seek assistance.

[17

FIRST, we open the discourse With pronouncing the praise of our Lord most High: Praise then to God for what he hath bestowed, Praise, by which we remove blindness from the sight! Next, benediction afterwards and salutation To the Prophet, whose religion is the ISLA'M, MOHAMMED, seal of his Lord's messengers, And his family, after him, and his friends! And let us pray god for his aid to us In what we have proposed to explain From the system of the Imam, ZAID ALFARADHI *, (Since this is among the noblest of purposes) By learning; for learning is the most deserving of efforts In it, and the worthiest vocation of the pious; And this branch of knowledge peculiarly belongs to what Has been openly declared among all the learned; And ZAID has unquestionably a just title To what the lord of the mission conferred on him, By pronouncing his excellence, clearly saying, " ZAID will teach you the law:" O glorious encomium! He, therefore, best deserves to be followed by the student, Especially since SHAFIEI takes him for a guide. This then is his doctrine epitomised

^{*} Faradh'ei, a man skilled in the faráyidil, or sacred ordinances contained in the Alcoran.

Free from a particle of ambiguity.
The causes of inheritance among men are three;
(The possessor of any one has the advantage of succession)
And they are wedlock, collateral relation, and descent:
There is not besides them a single cause of inheritance.

[2]

And any one of three incapacities Excludes a person from the succession; Servitude, and homicide, and a difference of faith: Understand then; since doubt is not like certainty. And those, who inherit among males, are ten; Their names are known, and every where mentioned: The son, and the son's son, however they descend, And the father, and his father, in the ascending line; And the brother, on whichever side he stands, Since GOD caused the KORAN to descend in his favour; And the son of a brother related by the same father, (Hear now the discourse containing no falsehood) And the paternal uncle, and such uncle's son, (Be thankful to him, who explains concisely and clearly) And the husband, and the emancipater nearly connected; And all the males, rubo inherit, are these. And all the inheriting females are seven, (To no woman, but them, does the law give that title) The daughter, and the son's daughter, and the tender mother,

And the grandmother, and the wife, and the emancipatress, And the sister, on whichever side she stands:

And this their number thus appears.

And know, that inheritance is of two sorts, which are The share, and the heirship * of what is distributable. Now the shares, by the declaration of the book, are six: (Besides them is no share in the inheritance)

^{*} Pronounced in India, ferz and asha. See the last words of the report by the Mahomedan doctors in the Paina cause.

A moiety, and a fourth; next, half a fourth,
And a third, and a sixth, as the law declares,
And two thirds; and these are the whole.
Remember then; for "Every one, who remembers, as an IMAM*."

[3]

A moiety then is the share of five persons,
The husband, and the female child,
And the daughter of a son, on failure of daughters,
And the whole sister, by the opinion of every MUFTI,
And, after her, the sister, who has the same father;
This when they stand alone without any HEIR.
And a fourth is the share of the husband, if there be with
him

Any children of the wife, who deprive him of more;
And this is for every wife, or more than one
On failure of children, as it is ordained.
And the eighth is for the wife, or the wives,
Together with sons or with daughters †,
Or with children of sons: learn then,
And remain firm in venerating study, and prosper.
And two thirds are for the daughters all together,
When there are more than one; (hear attentively)
And the same portion is for the daughters of a son:
(Comprehend my discourse with clear discernment)
This also is for two sisters, and for what exceeds that
number;

The ingenuous and the pious have thus decided:
This, whether they be by the father and the mother,
Or by the father only. (Act by this rule; thou wilt be right)
And the third is the mother's share, when there is no child,

† See the answer of Mohammed Kásim to the thirteenth question proposed to him in the Patna cause,

^{*} A saying, I believe, of Mahomed: he meaned a rememberer of his oral precepts. Hence the name of Hafidh, or Hafiz, was assumed by many illustrious persons, and, among them, by the celebrated poet.

Nor any assemblage or number of brethren,
As two brothers, or two sisters, or three;
The rule in this case regards males as well as females.
And, if there be a husband, and a mother, and a father,
A third of what remains is allotted to her;
And so with a wife: (advance then,
And be not seated apart from the sciences.)

[4]

And a third is for two males or two females
Of the mother's children, without deceit;
And so, if there be more, and they seek their allotment,
There is no provision for them in what exceeds that share,
And females and males are held equal
In this distribution, as the written law declares.
And a sixth is the share of seven in number,
The father, and the mother, then the son's daughter,
and the grandfather,

And the sister, daughter of the father, next the grandmother,

And the mother's child: the number is complete.

And the father has a right to it with the children,
And so the mother, by the revelation of the Eternal:
And the same is for her with two
Of the dead man's brothers: give those two a just allotment.
And the grandfather is like the father, on his death,
In the distribution of what accrues to him and relieves him,
Except when there are brothers living,
Since they are preferable to him in proximity*;
And their due and his due shall be introduced
With a full explanation in the different cases.
And the son's daughter takes a sixth, when
She is with a daughter, alike in descent,

^{*} The margin has minho for wahû. From this verse it appears, that the degrees of consanguinity are computed by the Mahomedans in the same manner as by our common lawyers.

And thus a sister with a sister, who
Is related, O my brother, by the same father.
And, if the relation of the grandmothers be equal,
Both of them are called to the succession;
And a sixth is divided between them equally
By the just and the legal mode of partition.
And every female, who claims through one not inheriting,
Has herself no portion of the inheritance.

T57

And the distant kinswoman is excluded by the near By the better opinions: (say now to me, "Enough.") And here ends the distribution of the SHARES, Without perplexity or intricacy: And it is just, that we propound the law of HEIRSHIP With every sentence concise and exact. Now every one, who appropriates all the estate, Among the near descendants or relations, Or who takes what remains after the portions, He is distinguished by the title of HEIR*, As the father, and the grandfather, and his father, And the son, in a near and a remote degree, And the brother, and the brother's son, and the uncles, And the master, who generously manumitted his slave. And thus their sons, all of them: (Be attentive then to what I pronounce). And there is not to the distant, with the near, kinsman Any share or portion in the inheritance. And the brother and the uncle by mother and father Are preferred to those descended by the half blood. And the son and the brother with females Have the heirship over them in the estate:

^{*} See A Narrative of the Proceedings in the Patna Cause, p. 11. Note b. The Arabick verb ûs's' aba primarily signifies to collect and bind together the branches of a tree: hence the secondary sense, to constitute the heir and head of a family.

And there is not among women any heiress Except her, who kindly freed the enslaved neck. And the sisters, if there be daughters, Take the residue after their portions. And the grandfather is precluded from inheriting By the father in all his three cases; And thus the grandson by the son: (do not then Turn aside, in deviation from the clear rules).

[6]

And the grandmothers on each side are excluded By the mother: (remember this *rule*, and decide conformably)

And brothers are excluded by sons And by the nearest progenitor, as we are taught, Or by sons' sons, when there are any; A number and one are in this respect alike. And the mother's son remains in exclusion By the grandfather (remember this with care) And by the daughters, and the son's daughters: (Be very assiduous in committing knowledge to memory) Besides, the son's daughters are excluded, when The daughters take two thirds, O young man, Except when a male has the heirship over them Of the son's children, by what they assert: And, after them, the sisters, who Descend in proximity from both sides, When they take their complete portions, Exclude the weeping daughters of the dead father; And, if they have a brother present, He has the heirship over them, in private and publick, And the brother's son is not the heir over Whoever is equal to, or above, him in descent. And, if thou find a husband and a mother inheriting, And brothers by the mother, they take each a third; And so if there be brothers by the mother and the father,

And the whole estate is comprised in the allotment of shares, Place them all to the side of the mother, And consider their father as a rock in the sea, And divide among the brethren a third of the estate left, And this is the case of mushtaraca, or parcenary.

[7]

And now we will enter upon what we desire Concerning the grandfather and the brothers, as we promised.

Incline then thine ear to what I shall say,
And collect at once the whole purport of my words;
And know, that the grandfather has different cases;
I will inform thee of them successively:
And he has a share with the brothers in them, when
The division redounds not to any loss upon him.
And sometimes he takes an entire third,
If there be in the distribution any descendants from him,
And there he not among them any entitled to shares,
(Be content with my explanation without questions)
And sometimes he takes a third of the remainder
After those, who have portions and provisions;
This, when the dividend is become
Too diminished for the other share by the press of

And sometimes he takes a sixth of the property,
And there is no descendant from him in that case;
And he, with females in the division, is
Like the brother in his share and his right.
And reckon the father's children in the number,
(And leave the mother's children with the grandfathers)
And, after that number, give to the brethren
Thy just allotment among them on failure of the grandfather.

And the sister has no share with the grandfather
In what exceeds the case already concluded;
The consort and the mother, and these two are all of them,

(Know then, for the best of the sect is he who knows best)

Are called, O friend, the acduriyyah*;

And they deserve to be remembered by thee.

[8]

Half then is given to her, and a sixth to him, Until there is a remainder after the entire shares, Then they return to the distribution As before-mentioned: (recollect it, and thank the author) And, if thou desire a knowledge of computation, Thou wilt by its means attain the right proceeding: And thou wilt understand divisions and analysis, And wilt be acquainted with integers and fractions; Extract then the roots in solving problems +, And be not remiss in committing them to memory; Now they, when the discourse about them is precise, Are three, to which a remainder belongs, And, after them, four complete divisors, To which no remainder belongs, nor any fraction ‡. Now the sixth, thou wilt see, is from six portions, And the third and the fourth from twelve; And if to an eighth a sixth be added, The new root, concerning which the calculation is just, Becomes four, which twenty follow, As arithmeticians universally know &. And these three roots, If the shares be many, leave a remainder. And let six come to the connexion of ten In the known table commonly delineated ||,

^{*} The Arabian lexicographers give this name to the husband or wife, the mother, the grandfather, and the whole sister; possibly, because the rules of succession are a little disturbed in favour of them.

[†] By as'l, or root, he must mean the denominator of a fraction.

[‡] He, probably, considers the whole estate as twelve, which has four divisors, besides unit.

[§] In our notation (which the Asiaticks, if they are wise, will adopt), $\frac{1}{4} + \frac{1}{6} = \frac{7}{2}$.

Il This passage I do not understand, not knowing the table to which

And let that follow, which succeeds it in the series, In the excess, by distinct progressions, to seventeen; And the third number leaves a remainder Of its eighth part: (proceed then, as I direct) And half and what remains, or the two halves, Their root, in the rule concerning them, is two.

[9]

And the third comes obviously from three;
And the fourth is formed from four;
And the eighth, if it be required, is from eight;
And these are the second roots,
To which no remainder belongs: know this;
Then pursue the method of verifying it, and distribute:
And, if thou hast verified the root,
The end of lengthened computation is clear gain.
Give then to each person his share, from his root,
Complete, or broken from its remainder.
And, if thou see that the shares cannot be distributed
To the partakers of the inheritance, follow what is prescribed,

And seek the way of compendiousness in the work
By multiplication and proportion: this will remove error
from thee,

And restore to the whole quantity what agrees with it, And multiply it by the root, and be thou vigilant; Whether there be one denomination or more, Rememberwell, and dismiss from thee doubt and difficulty: And, if thou see multiplicity in the kinds, Then they, by the rule among men, Are numerically ranged in four terms, The skilful accountant will know them by the rules; The similar term, after it the proportional,

it refers. The seragenary table, which Wallis exhibits in the seventh chapter of his Algebra, is commonly used in Asia for multiplication and division. See Chardin, vol. III. p. 155.

And, after that, the concordant accompanying,
And the fourth is the discordant separated;
(The intelligent man will inform thee of their distinctions)
Take then from the similars one,
And take from the proportionals the rest,
And take the entire number of discordants,
And multiply them by the second term; and be not deceived.

T10T

And, mix the whole quantity with the concordant, And pursue by it the plainest of ways; And multiply it into the root, which thou hast investigated. And compute what is the sum, and what it amounts to; And divide it; and, if the division be just, The illiterate and the eloquent man will equally know it *; And this is the whole of the computation, (The work thus proceeds in similar cases) Without prolixity or digression; Be satisfied then with what it contains; for it is sufficient to And if one person die before the distribution, Make the shares just, and know his proper division; And state for him a fresh question, as it Has been distinctly explained, in what precedes: And consider; and, if the shares agree, Take them; thou art right; the quantity is complete; And mix it, or all of them, into the preceding, If there be not an agreement between them,

* The preceding verses contain an awkward rule of practice; but it hence appears, that Chardin was mistaken, when he asserted, that neither the Indians nor Persians of his time were at all acquainted with the c mmon practical rules: see his chapter on the Persian Arithmetick.

† It can only be of use, as an artificial memory, to those who already know the rules, but is insufficient for the teaching of them. These two or three pages are very enigmatical; but I should not despair of explaining them, if I had leisure to read a few arithmetical books of the Arabe or Persians.

And the new shares into the former shares
Are blended, or into the entire quantity;
And every share into the aggregate of the second
Is mixed, or into the whole quantity, manifestly:
And this is the method of monásakhah*;
Mount then by it the lofty degrees of excellence.
And, if there be among the claimants of the estate
A real hermaphrodite, removing all doubts,
Distribute to the less evident and to the certain;
Thou wilt allot with justice the clear portion;
And this is the rule of pregnant women,
Which is founded on the certain, and the less evident.

[11]

And, if many kinsmen die by ruin or drowning.

Or a calamity overwhelming all, as fire,

And the case of the survivor be not known,

And one deceased cannot be heir to another deceased,

Reckon them all, as if they were strangers;

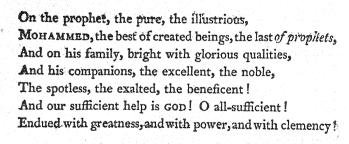
And this is the sound and true determination.

And now the discourse has come to what we desired

Concerning the distribution of estates, so that it is made clear,

By way of short hint and allusion,
Explained in an abbreviation of the sense.
Praise then to God in perfection,
Praise, abundant, complete in eternity;
And let us ask forgiveness for our defects,
And the best of what we hope in the place aspired to,
And pardon for what is passed of our sins,
And a covering for what is passed of our faults;
And the fairest of salutations and benisons

^{*} The grammarians, translated by Golius, thus explain the word temisokh or mondsakhah: "Mors et successio continua hæredum, quæ fit integrâ manente et indivisâ hæreditate;" but the last words convey no adequate idea of the thing.



The work is ended. Praise be to GOD, The ruler of worlds! and his blessing. And peace on our lord MOHAMMED, the Unlettered Prophet, And on his family and his companions, The excellent, the unblemished! On Friday night, one of the four nights at the close of Shewál in the year seven hundred and twelve *

The Transcriber, surnamed

FAKHRO'L SA'BIKA'NI

(or, Excelling his Predecessors)

confides in God Most High:

May God forgive his sins!

@ Y. C. 1819:

AL SIRAJIYYAH:

OR.

THE MOHAMMEDAN LAW OF

INHERITANCE;

WITH

A COMMENTARY,

BY

SIR WILLIAM JONES.



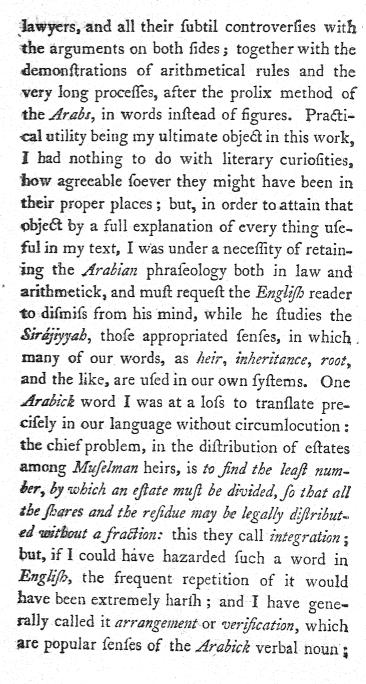
PREFACE.

THE two Muselman authors, whom I now introduce to my countrymen in India, are Shaikh SIRA'JU'DDI'N, a native of Sejávend, and Sayyad Shari'f, who was born at Jurján in Khwarezm near the mouth of the Oxus, and is faid to have died, at the age of feventy-fix years, in the city of Shiraz: their compositions have equal authority in all the Mohammedan courts, which follow the system of ABU HANIFAH, with those of LITTLETON and Coke in the courts at Westminster; and there is, indeed, a wonderful analogy between the works of the old Arabian and English lawyers, and between those of their feveral commentators; with this difference in favour of our own country, that LIT-TLETON is always too clear to need a gloss, and with this difference in favour of the Arabs, that the fole object of SHARI'F was to explain and illustrate his text, without an ostentatious dis-

play of his own erudition; but, when it is admitted, that a defire of extreme brevity has often made the Sirájiyyah obscure, the reader should in candour allow, that every author must appear to great disadvantage in a literal translation, especially when his own idiom differs totally from that of his translator, when his terms of art must be rendered by new words, which use alone can make easy, and when the system, which he unfolds to his countrymen, has no refemblance to any other, that the world ever knew. In the Sharifiyyah (for that is the popular title of the Arabian comment) we find little or no obscurity; and, if there be a fault in the book, it is a scrupulous minuteness of explanation, and a needless anxiety to remove every little cloud, which the reader himself might disperse by the slightest exertion of his intellect. Both works were translated into Persian by the order of Mr. HASTINGS; and the translation, which bears the name of Maulavi MUHAMMED Ka'sım, must appear excellent, and would be really useful, to such as had not access to the Arabick originals; but the text and comment are blended without any difcrimination, and both are fo intermixed with the notes of the translator himself, that it is often impossible to separate what is fixed law from what is merely his own opinion: he has

also erred (though it be certainly a pardonable errour) on the side of clearness, and has made his work so tediously perspicuous, that it sills, inclusively of a turgid and slowery dedication, about six hundred pages, and a faithful version of it in *English* would occupy a very large volume.

If the pains, which have been taken to render my own work as complete as possible, be meafured by the fize of it, they must be thought very inconsiderable; but in truth no greater pains could have been taken with any work; and it would have been a far easier task to have dictated or written a verbal translation of the two comments on my text, than to have made a careful felection of all that is important in them; for which purpose I perused each of them three times with the utmost attention, and have condensed in little more than fifty short pages the substance of them both, without any fuperfluous passage, that I should wish to be retrenched, and with as much perspicuity as I was able to give, in fo fhort a compass, to a fystem in some parts rather abstruse: lest men of business, for whom the book is intended, should be alarmed at first fight by the magnitude of it, I have omitted all the minute criticism, various readings, and curious Arabian literature; most of the anecdotes concerning old



but the number fought, or, to use the Arabian expression, the integrant of the case, I have usually named the divisor of the estate.

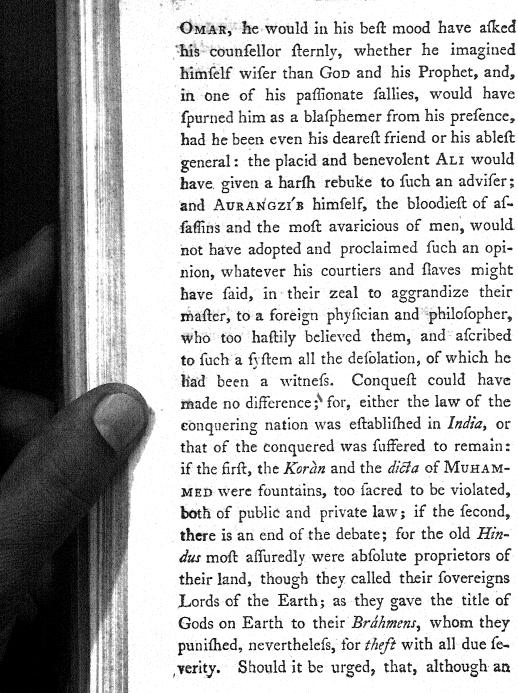
It will be seen in the Sirájiyyah, that the system of ZAID, though in part exploded by ABU HANIFAH, had very powerful supporters, and its author is always mentioned in terms of respect; it is the system, which I published at London above ten years ago; and I am not furprised, that, without a native affistant or even a marginal gloss, I could not then interpret the many technical words, which no dictionary explains, except in their popular fenses; but, though my literal version of the tract by ALMU-TAKANNA feems for pages together like a string of enigmas, yet the following work makes every fentence in it perfectly clear; and the original, which was engraved from a very old manufcript, appears to be a lively and elegant epitome of the law of inheritance according to ZAID, but manifestly designed to assist the memory of young students, who were to get it by heart, when they had learned the rules from some longer treatise, or from the mouths of their preceptors. This may be no improper place to inform the reader, that, although ABU HANI'FAH be the acknowledged head of the prevailing fect, and has given his name to it, yet so great veneration is shown to ABU Yu'sur and the lawyer Muhammed, that, when they both diffent from their master, the Muselman judge is at liberty to adopt either of the two decisions, which may seem to him the more consonant to reason, and sounded on the better authority.

I am strongly disposed to believe, that no possible question could occur on the Mohammedan law of succession, which might not be rapidly and correctly answered by the help of this work; but it would be easy to confirm or invalidate my opinion by the following method. Let one capital letter, or more, if necessary. represent each of the sharers, residuaries, and distant heirs: and let those letters be the initials of the feveral words, in aid of the memory. but so chosen (as without difficulty they may be) that all may be different; let them be placed in alphabetical order, and connected by the fign of addition; let an enumeration be then made, by the known rule, of all the poffible cases, in which they can occur, two and two, three and three, and fo forth; let them accordingly be arranged in tables from the lowest number to the highest; and let the share or allotment of each be fet above the letter. in the place of an exponent. If the question then were proposed, in what manner the property of HINDA must be distributed among her daughter, her fifter by the same father only, and the daughter of her son, the table of the third thas would exhibit this formula D + DF = + DS +; or, if AMRU had left his wife, two daughters, and both his parents, the formula in the fourth table would be 2 D $\frac{16}{27}$ + F $\frac{4}{27}$ + M $\frac{2}{27}$ + W 3 ; where the denominator of the index would be the integrant, as the Arabs call it, of the case, and the numerator would point out the feveral allotments: thus might we con-Aruct a fet of tables, mathematically accurate, in which the legal distribution, in every possible case, might be seen in a moment without thought and even without learning; and fuch a blind facility, though not very confistent with the dignity of science, would certainly be convenient in practice. We might also arrange the whole in a fynthetical method (of all the most luminous and fatisfactory) by beginning with the fentences of the Koran, as with indubitable axioms, followed by the genuine oral maxims of MUHAMMED; by subjoining the points, on which all the learned have at length agreed, and by concluding with cases deduced from those three sources of juridical knowledge, to which there should be constant references by numbers in the manner of geometricians: this method I propose to adopt in the Digest, from which I have separated the Sirájiyyab, because it feemed worthy of being exhibited entire, and may be considered as Institutes of Arabian Law on the important title, mentioned by the British

legislature, of inheritance and succession to lands, rents, and goods.

Unless I am greatly deceived, the work, now presented to the public, decides the question, which has been started, whether, by the Mogul constitution, the sovereign be not the sole proprietor of all the land in his empire, which he or his predecessors have not granted to a subject, and his beirs; for nothing can be more certain, than that land, rents, and goods are, in the language of all Mohammedan lawyers, property alike alienable and inheritable; and so far is the sovereign from having any right of property in the goods, or lands of his people, that even escheats are never appropriated to his use, but fall into a fund for the relief of the poor. SHARIF expressly mentions fields and bouses as inheritable and alienable property: he fays, that a house, on which there is a lien, shall not be fold to defray even funeral expenses; that, if a man dig a well in his own field, and another man perish by falling into it, he incurs no guilt; but, if he had trespassed on the field of another man, and had been the occasion of death, he must pay the price of blood; that buildings and trees pass by a fale of land, though not converfely; and he always expresses what we call property by an emphatical word implying dominion. Such dominion, fays he, may be acquired by the act of parties, as in the case of contracts, or, by the act of

law, as in the case of descents; and, having obferved, that freedom is the civil existence and life of a man, but flavery, his death and annihilation. he adds, because freedom establishes his right of property, which chiefly distinguishes man from other animals and from things inanimate; fo that he would have confidered subjects without property (which, as he fays in another place, comprifer every thing that a man may fell, or give, or leave for his beirs) as mere flaves without civil life: yet SHARIF was beloved and rewarded by the very conqueror, from whom the imperial house of Dehli boasted of their descent. The Koran allots to certain kindred of the deceased specifick shares of what he left, without a syllable in the book, that intimates a shade of distinction between realty and personalty; there is therefore no fuch distinction, for interpreters must make none, where the law has not diffinguished: as to Muhammed, he fays in positive words, that if a man leave either property, or rights, they go to his heirs; and SHARIF adds, that an heir succeeds to his ancestor's estate with an absolute right of ownership, right of possession, and power of alienation. Now I am fully perfuaded, that no Muselman prince, in any age or country, would have harboured a thought of controverting these authorities. Had the doctrine lately broached been suggested to the ferocious, but politick and religious,

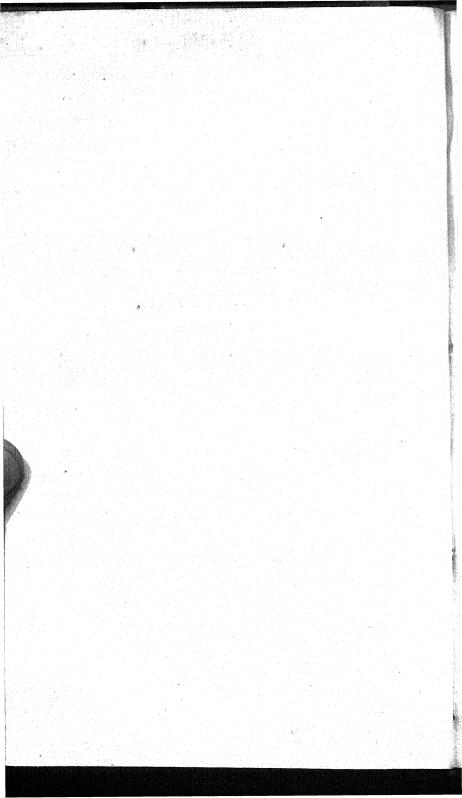


Indian prince may have no right, in his executive capacity, to the land of his subjects, yet, as the sole legislative power, he is above control; I answer firmly, that Indian princes never had, nor pretended to have, an unlimited legislative authority, but were always under the control of laws believed to be divine, with which they never claimed any power of dispensing.

I am happy in an opportunity of advancing these arguments against a doctrine, which I think unjust, unfounded, and big with ruin; for, in the course of nine years, I have seen enough of these provinces and of their inhabitants, to be convinced, that, if we hope to make our government a bleffing to them and a durable benefit to ourselves, we must realize our hope, not by wringing for the present the largest posfible revenue from our Asiatick subjects, but by taking no more of their wealth than the publick exigencies, and their own fecurity, may actually require; not by diminishing the interest, which landlords must naturally take in their own foil, but by augmenting it to the utmost, and giving them affurance, that it will descend to their heirs: when their laws of property, which they literally hold facred, shall in practice be secured to them; when the land-tax shall be so moderate, that they cannot have a colourable pretence to rack their tenants, and

when they shall have a well grounded confidence, that the proportion of it will never be raised, except for a time on some great emergence, which may endanger all they posses; when either the performance of every legal contract shall be enforced, or a certain and adequate compensation be given for the breach of it; when no wrong shall remain unredressed, and when redress shall be obtained at little expense, and with all the speed, that may be confistent with necessary deliberation; then will the population and resources of Bengal and Bahar continually increase, and our nation will have the glory of conferring happiness on confiderably more than twenty-four millions (which is at least the present number) of their native inhabitants, whose cheerful industry will enrich their benefactors, and whose firm attachment will fecure the permanence of our dominion.

AL SIRÁJIYYAH



INTRODUCTION.

IN THE NAME OF THE MOST MERCI-FUL GOD!

PRAISE be to GOD, the Lord of all worlds; the praise of those who give Him thanks! And His blessing on the best of created beings, MU-HAMMED, and his excellent family! The Prophet of GOD (on whom be his blessing and peace!) said: "Learn the laws of inheritance, "and teach them to the people; for they are "one half of useful knowledge." Our learned in the law (to whom GOD be merciful!) say: "There belong to the property of a person deceased four successive duties to be performed by the magistrate: first, his sune-"ral ceremony and burial without supersuity of expense, yet without desiciency; next, the

"discharge of his just debts from the whole of "his remaining effects; then the payment of "his legacies out of a third of what remains " after his debts are paid; and, lastly, the distri-56 bution of the refidue among his fuccessors, ac-66 cording to the Divine Book, to the Traditions, " and to the Assent of the Learned." They begin with the perfons entitled to shares, who are fuch as have each a specifick share allotted to them in the book of Almighty GOD; then they proceed to the residuary heirs by relation, and they are all fuch as take what remains of the inheritance, after those who are entitled to shares; and, if there be only residuaries, they take the whole property: next to residuaries for special cause, as the master of an enfranchised flave and his male residuary heirs; then they return to those entitled to shares according to their respective rights of consanguinity; then to the more distant kindred; then to the successor by contract; then to him who was acknowledged as a kinfman through another, fo as not to prove his confanguinity, provided the deceased persisted in that acknowledgement even till he died; then to the person, to whom the whole property was left by will; and laftly to the publick treasury.

On Impediments to Succession.

IMPEDIMENTS to succession are four; 1, fervitude, whether it be perfect or imperfect; 2, homicide, whether punishable by retaliation, or expiable; 3, difference of religion; and 4, difference of country, either actual, as between an alien enemy and an alien tributary; or qualified, as between a fugitive and a tributary, or between two fugitive enemies from two different states: now a state differs from another by having different forces and sovereigns, there being no community of protection between them.

On the Doctrine of Shares, and the Persons entitled to them.

THE furud, or shares, appointed in the book of Almighty GOD, are six: a moiety, a quarter, an eighth, two thirds, one third, and a sixth, fome formed by doubling, and fome by halving. Now those entitled to these shares are twelve persons; four males, who are the father and the true grandfather or other male ancestor, how high soever in the paternal line, the brother by the same mother, and the husband; and eight

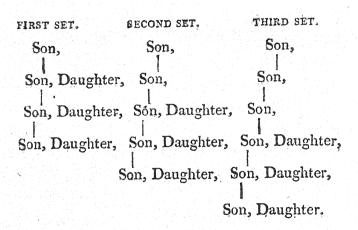
females, who are the wife, and the daughter, and the fon's daughter, or other female descendant how low soever, the fister by one father and mother, the fifter by the father's fide, and the fifter by the mother's fide, the mother, and the true grandmother, that is, she who is related to the deceased without the intervention of a false grandfather. (A false male ancestor is, where a female ancestor intervenes in the line of afcent.) The father takes in three cases; I, an absolute share, which is a fixth, and that with the fon, or fon's fon, how low foever; 2, a legal share, and a residuary portion also; and that with a daughter, or a fon's daughter, how low foever in the degree of descent; 3, he has a simple residuary title, on failure of children and fon's children, or other low descendants. The true grandfather has the same interest with the father, except in four cases, which we will mention presently, if it please GOD; but the grandfather is excluded by the father, if he be living; fince the father is the mean of confanguinity between the grandfather and the deceased. The mother's children also take in three cases: a fixth is the share of one only; a third, of two, or of more: males and females have an equal division and right; but the mother's children are excluded by children of the deceased and by son's children. how low foever, as well as by the father and the grandfather; as the learned agree. The husband takes in two cases; half, on failure of children, and son's children, and a fourth, with children or son's children, how low soever they descend.

On Women.

Wives take in two cases; a fourth goes to one or more on failure of children. and fon's children how low foever; and an eighth with children, or fon's children, in any degree of descent. Daughters begotten by the deceased take in three cases: half goes to one only, and two thirds to two or more; and, if there be a fon, the male has the share of two females, and he makes them residuaries. The son's daughters are like the daughters begotten by the deceafed; and they may be in fix cases: half goes to one only, and two thirds to two or more, on failure of daughters begotten by the deceased; with a fingle daughter of the deceafed, they have a fixth, completing (with the daughter's half), two thirds; but, with two daughters of the deceased, they have no share of the inheritance, unless there be, in an equal degree with, or in a lower degree than, them, a boy, who makes

them refiduaries. As to the remainder between them, the male has the portion of two females; and all of the fon's daughters are excluded by the fon himself.

If a man leave three son's daughters, some of them in lower degrees than others, and three daughters of the son of another son, some of them in lower degrees than others, and three daughters of the son's son of another son, some of them in lower degrees than others, as in the following table, this is called the case of tashbib.



Here the eldest of the first line has none equal in degree with her; the middle one of the first line is equalled in degree by the eldest of the second; and the youngest of the first line is equalled by the middle one of the second, and by the eldest of the third line; the youngest

of the fecond line is equalled by the middle one of the third line, and the youngest of the third set has no equal in degree.—When thou hast comprehended this, then we say: the eldest of the first line has a moiety; the middle one of the first line has a fixth together with her equal in degree to make up two thirds; and those in lower degrees never take any thing, unless there be a son with them, who makes them residuaries, both her who is equal to him in degree, and her who is above him; but who is not entitled to a share: those below him are excluded.

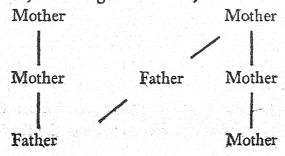
Sifters by the same father and mother may be in five cases: half goes to one alone; two thirds to two or more; and, if there be brothers by the same father and mother, the male has the portion of two semales; and the semales become residuaries through him by reason of their equality in the degree of relation to the deceased; and they take the residue, when they are with daughters, or with son's daughters, by the saying of Him, on whom be blessing and peace! "Make sisters, with daughters, residuaries."

Sifters by the fame father only are like fifters by the same father and mother, and may be in seven cases: half goes to one, and two thirds to two or more on failure of sisters by the same father and mother; and with one sister by the same father and mother, they have a fixth, as the complement of two thirds; but they have no inheritance with two sisters by the same father and mother, unless there be with them a brother by the same father, who makes them residuaries; and then the residue is distributed among them by the sacred rule "to the male "what is equal to the share of two semales." The sixth case is, where they are residuaries with daughters or with son's daughters, as we have before stated it.

Brothers and fifters by the same father and mother, and by the same father only, are all excluded by the son and the son's son, in how low a degree soever, and by the father also, as it is agreed among the learned, and even by the grandfather according to ABU HANIFAH, on whom be the mercy of ALMIGHTY GOD! And those of the half-blood are also excluded by the brothers of the whole blood.

The mother takes in three cases: a sixth with a child, or a son's child, even in the lowest degree, or with two brothers and sisters or more, by whichever side they are related; and a third of the whole on failure of those just-mentioned; and a third of the residue after the share of the husband or wise; and this in two cases, either when there are the husband and both parents, or the wise and both parents: if there be a

grandfather instead of a father, then the mother takes a third of the whole property, though not by the opinion of ABU YUSUF, on whom be GOD's mercy! for he fays, that in this case also fhe has only a third of the refidue. The grandmother has a fixth, whether she be by the father or by the mother, whether alone or with more, if they be true grandmothers and equal in degree; but they are all excluded by the mother, and the paternal female ancestors also by the father; and in like manner, by the grandfather, except the father's mother, even in the highest degree; for she takes with the grandfather, fince she is not related through him. The nearest grandmother, or female ancestor, on either fide, excludes the more distant grandmother, on whichever fide she be; whether the nearer grandmother be entitled to a share of the inheritance, or be herself excluded. When a grandmother has but one relation, as the father's mother's mother, and another has two fuch relations, or more, as the mother's mother's mother, who is also the father's father's mother, according to this table,



then a fixth is divided between them, according to ABU YUSUF, in moieties, respect being had to their persons; but, according to MU-HAMMED (on whom be GOD's mercy!) in thirds, respect being had to the sides.

On Residuaries.

RESIDUARIES by relation to the deceased are three: the residuary in his own right, the residuary in another's right, and the refiduary together with another. Now the refiduary in his own right is every male, in whose line of relation to the deceased no female enters; and of this fort there are four classes; the offspring of the deceased, and his root; and the offspring of his father and of his nearest grandfather, a preference being given, I mean a preference in the right of inheritance, according to proximity of degree. The offspring of the deceafed are his fons first; then their fons, in how low a degree foever: then comes his root, or his father; then his paternal grandfather, and their paternal grandfathers, how high foever; then the offspring of his father, or his brothers; then their fons, how low foever; and then the offfpring of his grandfather, or his uncles: then their fons, how low foever. Then the strength

of confanguinity prevails: I mean, he, who has two relations is preferable to him, who has only one relation, whether it be male or female, according to the faying of Him, on whom be peace! "Surely, kinfmen by the fame father " and mother shall inherit before kinsmen by " the same father only:" thus a brother by the fame father and mother is preferred to a brother by the father only, and a fifter by the same father and mother, if she become a residuary with the daughter, is preferred to a brother by the father only; and the fon of a brother by the same father and mother is preferred to the son of a brother by the fame father only; and the rule is the same in regard to the paternal uncles of the deceased; and, after them, to the paternal uncles of his father, and, after them, to the paternal uncles of his grandfather.

The residuaries in another's right are sour females; namely, those whose shares are half and two thirds, and who become residuaries in right of their brothers, as we have before mentioned in their different cases; but she who has no share among semales, and whose brother is the heir, doth not become a residuary in his right; as in the case of a paternal uncle and a paternal aunt.

As to refiduaries together with others: fuch is every female who becomes a refiduary with

another female; as a fifter with a daughter, as we have mentioned before. The last residuary is the master of a freedman, and then his residuary heirs, in the order before stated; according to the faying of Him, on whom be bleffing and peace! "The master bears a relation like "that of confanguinity;" but females have nothing among the heirs of a manumittor, according to the faying of Him, on whom be bleffing and peace! "Women have nothing " from their relation to freedmen, except when "they have themselves manumitted a slave; or their freedman has manumitted one, or they " have fold a manumission to a slave, or their "vendee has fold it to his slave, or they have " promised manumission after their death, or " their promisee has promised it after his death, " or unless their freedman or freedman's freed-" man draw a relation to them."

If the freedman leave the father and son of his manumittor, then a fixth of the right over the property of the freedman vests in the father, and the residue in the son, according to ABU YUSUF; but, according to both ABU HANIFAH and MUHAMMED, the whole right vests in the son; and, if a son and a grandfather of the manumittor be lest, the whole right over the freedman goes to the son, as all the learned agree. When a man possesses as his slave a

kinsman in a prohibited degree, he manumits him, and his right vests in him; as if there be three daughters, the youngest of whom has twenty dinars, and the eldest, thirty; and they two buy their father for fifty dinars; and afterwards their father die leaving some property; then two thirds of it are divided in thirds among them, as their legal shares, and the residue goes in fifths to the two who bought their father; three fifths to the eldest and two fifths to the youngest; which may be settled by dividing the whole into forty-five parts.

On Exclusion.

Exclusion is of two forts: 1. Imperfect, or an exclusion from one share, and an admission to another; and this takes place in respect of sive persons, the husband or wise, the mother, the son's daughter, and the sister by the same father; and an explanation of it has preceded. 2. Perfect exclusion: there are two sets of persons having a claim to the inheritance: one of which sets is not excluded entirely in any case; and they are six persons, the son, the father, the husband, the daughter, the mother, and the wise; but the other set inherit in one case and in another case

are excluded. This is grounded on two principles; one of which is, that "whoever is related " to the deceased through any person, shall not "inherit, while that person is living;" as a fon's fon, with the fon; except the mother's children, for they inherit with her; fince she has no title to the whole inheritance: the fecond principle is, " that the nearest of blood must take," and who the nearest is, we have explained in the chapter on refiduaries. A person incapable of inheriting doth not exclude any one, at least in our opinion; but, according to IBNU MASUUD (may GOD be gracious to him!) he excludes imperfectly; as an infidel, a murderer, and a flave. A person excluded may, as all the learned agree, exclude others; as, if there be two brothers or fifters or more, on which ever fide they are, they do not inherit with the father of the deceased, yet they drive the mother from a third to a fixth.

On the Divisors of Shares.

Know, that the fix shares mentioned in the book of Almighty GOD are of two sorts: of the first are a moiety, a fourth, and an eighth; and of the second sort are two thirds, a third, and a sixth, as the fractions are halved and

doubled. Now, when any of these shares occur in cases singly, the divisor for each share is that number which gives it its name (except half, which is from two), as a fourth denominated from four, an eighth from eight, and a third from three: when they occur by two or three, and are of the same fort, then each integral number is the proper divisor to produce its fraction, and also to produce the double of that fraction, and the double of that, as fix produces a fixth, and likewise a third, and two thirds; but, when half, which is from the first fort, is mixed with all of the fecond fort or with fome of them, then the division of the estate must be by fix; when a fourth is mixed with all of the fecond fort or with some of them, then the divifion must be into twelve; and when an eighth is mixed with all of the fecond fort, or with fome of them, then it must be into four and twenty parts.

On the Increase.

Aul, or increase, is, when some fraction remains above the regular divisor, or when the divisor is too small to admit one share. Know, that the whole number of divisors is seven, sour

of which have no increase, namely, two, three, four, and eight; and three of them have an increase. The divisor, fix, is, therefore, increased by the aul to ten, either by odd, or by even, numbers; twelve is raifed to seventeen by odd. not by even, numbers; and twenty-four is raised to twenty-seven by one increase only; as in the case, called Mimberiyya (or a case anfwered by ALI when he was in the pulpit), which was this, " A man left a wife, two daughters, and both his parents." After this there can be no increase, except according to IBN MASUUD (may GOD be gracious to him!) for, in his opinion, the divisor twentyfour may be raifed to thirty-one; as if a man leave a wife, his mother, two sisters by the same parents, two fifters by the fame mother only, and a fon rendered incapable of inheriting.

On the Equality, Proportion, Agreement, and Difference of two Numbers.

THE temáthul of two numbers is the equality of one to the other; the tedákhul is, when the smaller of two numbers exactly measures the larger, or exhausts it; or we call it tedákhul, when the larger of two numbers is divided ex-

actly by the smaller; or we may define it thus, when the larger exceeds the fmaller by one number or more equal to it, or equal to the larger; or it is, when the smaller is an aliquot part of the larger, as three of nine. The tawáfuk, or agreement, of two numbers is, where the smaller does not exactly measure the larger, but a third number measures them both, as eight and twenty, each of which is measured by four, and they agree in a fourth; fince the number measuring them is the denominator of a fraction common to both. The tabayun of two numbers is, when no third number whatever measures the two discordant numbers, as nine and ten. Now the way of knowing the agreement or disagreement between two different quantities is, that the greater be diminished by the smaller quantity on both sides, once or oftener, until they agree in one point; and if they agree in unit only, there is no numerical agreement between them; but, if they agree in any number, then they are (faid to be) mutawasik in a fraction, of which that number is the denominator; if two, in half; if three, in a third; if four, in a quarter; and so on, as far as ten; and, above ten, they agree in a fraction; I mean, if the number be eleven, the fraction of eleven, and, if it be fifteen, by the fraction of fifteen. Pay attention to this rule.

Association of the second

On Arrangement.

In arranging cases there is need of seven principles; three, between the shares and the persons, and four between persons and persons. Of the three principles the first is, that, if the portions of all the classes be divided among them without a fraction, there is no need of multiplication, as if a man leave both parents and two daughters. The second is, that, if the portions of one class be fractional, yet there be an agreement between their portions and their persons, then the measure of the number of persons, whose shares are broken, must be multiplied by the root of the case, and its increase, if it be an increased case, as if a man leave both parents and ten daughters, or a woman leave a husband, both parents, and fix daughters. The third principle is, that, if their portions leave a fraction, and there be no agreement between those portions and the persons, then the whole number of the persons, whose shares are broken, must be multiplied into the root of the case, as if a woman leave her husband and five fifters by the same father and mother. Of the four other principles the first is, that, when there is a fractional division between two classes or more, but an equality between the numbers

of the persons, then the rule is, that one of the numbers be multiplied into the root of the case; as if there be fix daughters, and three grandmothers, and three paternal uncles. The fecond is, when some of the numbers equally measure the others; then the rule is, that the greater number be multiplied into the root of the case; as, if a man leave four wives and three grandmothers and twelve paternal uncles. The third is, when some of the numbers are mutawafik. or composit, with others; then the rule is, that the measure of the first of the numbers be multiplied into the whole of the fecond, and the product into the measure of the third, if the product of the third be mutawafik, or, if not, into the whole of the third, and then into the fourth, and so on, in the same manner; after which the product must be multiplied into the root of the case; as, if a man leave four wives. eighteen daughters, fifteen female ancestors, and fix paternal uncles. The fourth principle is, when the numbers are mutabayan, or not agreeing one with another; and then the rule is, that the first of the numbers be multiplied into the whole of the fecond, and the product multiplied by the whole of the third, and that product into the whole of the fourth, and the last product into the root of the case; as, if a

man leave two wives, fix female ancestors, ten daughters, and seven paternal uncles.

Section.

WHEN thou defireft to know the share of each class by arrangement, multiply what each class has from the root of the case by what thou hast already multiplied into the root of the case, and the product is the share of that class; and, if thou defireft to know the share of each individual in that class by arrangement, divide what each class has from the principle of the case by the number of the perfons in it, then multiply the quotient into the multiplicand, and the product will be the share of each individual in that class. Another method is, to divide the multiplied number by whichever class thou thinkest proper, then to multiply the quotient into the share of that set, by which thou hast divided the multiplied number, and the product will be the share of each individual in that set. Another method is by the way of proportion, which is the clearest; and it is, that a proportion be ascertained for the share of each class from the root of the case to the number of perfons one by one, and that, according to such proportion from the multiplied number, a share be given to each individual of that class,

On the Division of the Property left among Heirs and among Creditors.

IF there be a disagreement between the property left and the number arising from the arrangement, then multiply the portion of each heir, according to that arrangement, into the aggregate of the property, and divide the product by the number of the arrangement, but, when there is an agreement between the arrangement and the property left, then multiply the portion of each heir, according to the arrangement into the measure of the property, and divide the product by the measure of the number arising from the arrangement: the quotient is the portion of that heir in both methods. This rule is in order to know the portion of each individual among the heirs; but, in order to know the portion of each class of them, multiply what each class has, according to the root of the case, into the measure of the property left, then divide the product by the meafure of the case, if there be an agreement between the property left and the case; but, if there be a disagreement between them, then multiply into the whole of the property lest, and divide the product by the whole number arising from the verification of the case; and the quotient will be the portion of that class in both methods. Now, as to the payment of debts, the debts of all the creditors stand in the place of the arranging number.

On Subtraction.

When any one agrees to take a part of the property left, subtract his share from the number arising by the proof, and divide the remainder of the property by the portions of those who remain; as if a woman leave her husband, her mother, and a paternal uncle: now suppose that the husband agrees to take what was in his power of his bridal gift to the wise; this is deducted from among the heirs: then what remains is divided between the mother and the uncle in thirds, according to their legal shares; and thus there will be two parts for the mother, and one for the uncle.

On the Return.

The return is the converse of the increase; and it takes place in what remains above the shares of those entitled to them, when there is no legal claimant of it: this furplus is returned to the sharers according to their rights, except the husband or the wise; and this is the opinion of all the Prophet's companions, as ÂLI and his followers, may GOD be gracious to them! And our masters (to whom GOD be merciful!) have assented to it: ZAID, the son of THA'-BIT says, that the surplus doth not revert, but goes to the publick treasury; and to this opinion have assented URWAH and ALZUHRI' and MA'LIC and ALSHA'FII, may GOD be merciful to them!

Now the cases on this head are in sour divisions: the first of them is, when there is in the case but one sort of kinsmen, to whom a return must be made, and none of those who are not entitled to a return: then settle the case according to the number of persons; as, when the deceased has left two daughters, or two sisters, or two semale ancestors; settle it, therefore, by two. The second is, when there are joined in the case two or three sorts of those, to whom a return must be made, without any of those, to whom there is no return: then fettle the cafe according to their shares; I mean by two, if there be two fixths in the case; or by three, when there are a third and a fixth in it; or by four, when there are a moiety and a fixth in it; or by five, when there are in it two thirds and a fixth, or half and two fixths, or half and a third. The third is, when in the first case, there is any one to whom no return can be made: then give the share of him or her, to whom there is no return, according to the lowest denominator, and if the residue exactly quadrate with the number of persons, who are entitled to a return, it is well; as if there be a husband and three daughters; but, if they do not agree, then multiply the measure of the number of the persons, if there be an agreement between the number of persons and the residue, into the denominator of the shares of those, to whom no return is to be made: as if there be a husband, and fix daughters; if not, multiply the whole number of the persons into the denominator of the share of those, to whom there is no return; and the product will fet the case right. The fourth is, when, in the second case, there are any to whom no return is made: then divide what remains from the denominator of the share of him or them, who have no return, by the case of those, to whom a return must be made, and, if the remainder quadrate, it is well; and this is in one form; that is, when a fourth goes to the wives, and the refidue is distributed in thirds among those entitled to a return; as if there be a wife, and a grandmother, and two fifters by the mother's fide: but, if it do not quadrate, then multiply the whole case of those, who are entitled to a return, into the denominator of the share of him or her, who is not entitled to it; and the product will be the denominator of the shares of both classes; as if there be four wives, and nine daughters, and fix female ancestors: then multiply the shares of those, to whom no return must be made, into the case of those, who are entitled to a return, and the shares of those, to whom a return is to be made, into what remains of the denominator of the share of those. who are not entitled to a return. If there be a fraction in some, adjust the case by the beforementioned principles.

On the Division of the Paternal Grandfather.

ABUBECR the Just (on whom be the grace of GOD!) and those, who followed him, among the companions of the Prophet, say, "the bre-

"thren of the whole blood and the brethren by " the father's fide inherit not with the grand-"father:" this is also the decision of ABU HANÍFA (on whom be GOD's mercy!) and judgments are given conformably to it. ZAID the fon of THABIT, indeed, afferts, that they do inherit with the grandfather, and of this opinion are both ABU YUSUF and MUHAM-MED, as well as MALIC and ALSHAFII. According to ZAID, the fon of THABIT (on whom be GOD's mercy!) the grandfather. with brothers or fifters of the whole blood and by the father's fide, takes the best in two cases. from the mukásamab, or division, and from a third of the whole estate. The meaning of mukásamab is, that the grandfather is placed in the division as one of the brethren, and the brethren of the half blood enter into the divifion with those of the whole blood, to the prejudice of the grandfather; but, when the grandfather has received his allotment, then the half blood are removed from the rest, as if disinherited, and receive nothing; and the refidue goes to the brethren of the whole blood; except when among those of the whole blood there is a fingle fifter, who receives her legal share, I mean the whole after the grandfather's allotment: then, if any thing remains, it goes to the half blood; if not, they have nothing;

and this is the case, when a man leaves a grandfather, a fifter by the same father and mother. and two fifters by the same father only: in this case there remains to those fisters a tenth of the estate, and the correct denominator is twenty; but, if there be, in the preceding case, one fister by the same father only, nothing remains for her; and if one, entitled to a legal share, be mixed with them, then, after he has received his share, the grandfather has the best in three arrangements; either the division, when a woman leaves her husband, a grandfather, and a brother; or a third of the residue is given, when a man leaves a grandfather, a grandmother, and two brothers, and a fifter by the same father and mother. Or a fixth of the whole estate is given, when a man leaves a grandfather and a grandmother, a daughter, and two brothers; and, when a third of the refidue is better from the grandfather, and the residue has not a complete third, multiply the denominator of the third into the root of the cafe. If a woman leave a grandfather, her husband, a daughter, her mother, and a fifter by the fame father and mother, or by the same father only, then a fixth is best for the grandfather, and the root of the case is raised to thirteen, and the fifter has nothing. Know, that ZAID, the fon of THABIT (on whom be GOD's grace!) has

not placed the fifter by the fame father and mother, or by the same father, as entitled to a thare with the grandfather, except in the case, named acdariyyah, and that is, the husband, the mother, a grandfather, and a fifter by the same father and mother, or by the same father only; in which case the husband ought to have a moiety; the mother, a third; the grandfather, a fixth; and the fifter, a moiety; then the grandfather annexes his share to that of the sister. and, a division is made between them by the rule "a male has the portion of two females;" and this is, because the division is best for the grandfather. The root is regularly fix, but is increased to nine; and a correct distribution is made by twenty-feven. The case is called acdariyyah, because it occurred on the death of a woman belonging to the tribe of ACDAR. If, instead of the sister, there be a brother or two fisters, there is no increase, nor is that case an acdariyyah.

On Succession to Vested Interests.

Ir some of the shares become vested inheritances before the distribution, as if a woman leave her husband, a daughter, and her mother,

and the husband die, before the estate can be distributed, leaving a wife and both his parents, if then the daughter die leaving two fons, a daughter, and a maternal grandmother, and then the grandmother die leaving her husband and two brothers, the principle in this event is, that the case of the sirst deceased be arranged, and that the allotment of each heir be considered as delivered according to that arrangement; that, next, the case of the second deceased be arranged, and that a comparison be made between what was in his hands, or vested in interest, from the first arrangement, and between the second arrangement, in three fituations; and if, on account of equality, what is in his hands from the first arrangement quadrate with the second arrangement, then there is no need of multiplication; but, if it be not right, then see whether there be an agreement between the two, and multiply the measure of the second arrangement into the whole of the first arrangement; and, if there be a disagreement between them, then multiply the whole of the second arrangement into the whole of the first arrangement, and the product will be the denominator of both cases. The allotments of the heirs of the first deceased must be multiplied into the former multiplicand, I mean into the fecond arrangement or into its measure; and the allotments

of the heirs of the second deceased must be multiplied into the whole of what was in his hands, or into its measure; and, if a third or a fourth die, put the second product in the place of the first arrangement, and the third case in the place of the second, in working; and thus in the case of a fourth and a fifth, and so on to infinity.

On Distant Kindred.

A DISTANT kinfman is every relation, who is neither a sharer nor a residuary. The generality of the Prophet's companions repeat a tradition concerning the inheritance of distant kinsmen; and, according to this, our masters and their followers (may GOD be merciful to them!) have decided; but ZAID, the fon of THABIT (on whom be GOD's grace!) fays: "there is no inheritance for the distant kin-"dred, but the property undisposed of is placed " in the publick treasury;" and with him agree MALIC and ALSHAFII, on whom be GOD's mercy! Now these distant kindred are of four classes: the first class is descended from the deceased; and they are the daughter's children, and the children of the son's daughters. The fecond fort are they, from whom the degeafed descend; and they are the excluded grand-

fathers and the excluded grandmothers. The third fort are descended from the parents of the deceased; and they are the fifter's children and the brother's daughters, and the fons of brothers by the same mother only. The fourth fort are descended from the two grandfathers and two grandmothers of the deceafed; and they are, paternal aunts, and uncles by the fame mother only, and maternal uncles and aunts. These, and all who are related to the deceased through them, are among the distant kindred. ABÚ SULAIMÁN reports from MUHAM-MED the fon of ALHASAN, who reported from ABU HANIFAH (on whom be GOD's mercy!) that the fecond fort are the nearest of the four forts, how high foever they afcend; then the first, how low soever they descend; then the third, how low foever; and lastly, the fourth, how distant soever their degree: but ABU YU-SUF and ALHASAN the fon of ZIYAD, report from ABU HANIFAH (on whom be the mercy of GOD!) that the nearest of the four forts is the first, then the second, then the third. then the fourth, like the order of the residuaries; and this is taken as a rule for decision. According to both ABU YUSUF and MU-HAMMED, the third fort has a preference over the maternal grandfather.

On the First Class.

THE best entitled of them to the succession is the nearest of them in degree to the deceased; as the daughter's daughter, who is preferred to the daughter of the fon's daughter; and, if the claimants are equal in degree, then the child of an heir is preferred to the child of a distant relation; as the daughter of a fon's daughter is preferred to the fon of a daughter's daughter; but, if their degrees be equal, and there be not among them the child of an heir, or, if all of them be the children of heirs, then, according to ABU YUSUF (may GOD be merciful to him!) and ALHASAN, fon of ZIYAD, the persons of the branches are considered, and the property is distributed among them equally, whether the condition of the roots, as male or female, agree or difagree; but MUHAMMED (on whom be GOD's mercy!) considers the perfons of the branches, if the fex of the roots agree, in which respect he concurs with the other two; and he considers the persons of the roots, if their fexes be different, and he gives to the branches the inheritance of the roots, in oppontion to the two lawyers. For instance, when a man leaves a daughter's fon, and a daughter's daughter, then, according to ABU YUSUF and ALHASAN, the property is distributed between them, by the rule " the male has the portion of

two females," their persons being considered; and, according to MUHAMMED, in the fame manner; because the sexes of the roots agree: and, if a man leave the daughter of a daughter's fon, and the fon of a daughter's daughter, then, according to the two first mentioned lawyers, the property is divided in thirds between the branches, by considering the persons, two thirds of it being given to the male, and one third to the female; but, according to MUHAMMED (on whom be GOD's mercy!) the property is divided between the roots, I mean those in the second rank, in thirds, two thirds going to the daughter of the daughter's fon, namely, the allotment of her father, and one third of it to the fon of the daughter's daughter, namely, the share of his mother. Thus, according to MUHAMMED. (to whom GOD be merciful!) when the children of the daughters are different in fex, the property is divided according to the first rank that differs among the roots; then the males are arranged in one class, and the females in another class, after the division, and what goes to the males is collected and distributed according to the highest difference that occurs among their children, and, in the same manner, what goes to the females; and thus the operation is continued to the end according to this scheme:

S	$ \mathbf{S} $	S	D	D	D	D	D	D	D	D	D
D	D	D	D	D	D	1)	D	D	D	D	D
$\overline{\mathbf{S}}$	D	D	S	S	S	D	D	D	D	D	D
D.	D	D	S	D	D	S	S	\mathbf{s}	D	D	D
D	S	D	D	D	D	S	D	D	\mathbf{S}	D	D
D	D	D	D	D	S	D	D	S	D	S	T

Thus MUHAMMED (to whom GOD be merciful!) takes the fex from the root at the time of the distribution, and the number from the branches; as, if a man leave two sons of a daughter's daughter's daughter, and a daughter of a daughter's daughter's son, and two daughters of a daughter's son's daughter, in this form;

The Deceased,

Daughter	Daughter	Daughter
Son	Daughter	Daughter
Daughter	Son	Daughter
Two Daughters	Daughter	Two Sons.

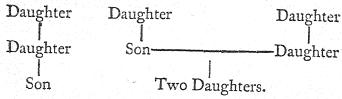
In this case according to ABU YUSUF (on whom be GOD's mercy!) the property is divided among the branches in seven parts, by considering their persons; but, according to MU-HAMMED (to whom GOD be merciful!) the property is distributed according to the highest difference of sex, I mean in the second rank, in sevenths, by the number of branches in the roots; and, according to him, four sevenths of it go to the daughters of the daughter's son's daughter; since that is the share of their grand-

father, and three fevenths of it, which are the allotment of the two daughters, are divided between their two children. I mean those in the third rank, in moieties; one moiety to the daughter of the daughter's daughter's fon, which is the share of her father, and the other moiety to the two fons of the daughter's daughter's daughter, being the share of their mother: the correct divisor of the property is, in this case, twenty-eight. The opinion of MUHAMMED (on whom be GOD's mercy!) is the more generally received of the two traditions from ABU HANIFAH (to whom GOD be merciful!) in all decisions concerning the distant kindred; and this was the first opinion of ABU YUSUF: then he departed from it, and faid that the roots were by no means to be confidered.

A Section.

OUR learned lawyers (on whom be the mercy of GOD!) confider the different fides in succeffion; except that ABU YUSUF (may GOD be merciful to him!) confiders the fides in the persons of the branches, and MUHAMMED (on whom be GOD's mercy!) considers the sides in the roots; as, when a man leaves two daughters of a daughter's daughter, who are also the two daughters of a daughter's son, and the son of a daughter's daughter, according to this scheme:

The Deceased.



In this case, according to ABU YUSUF, the property is divided among them in thirds, and then the deceased is considered as if he had lest four daughters and a son; two thirds of it, therefore, go to the two daughters, and one third to the son: but, according to MUHAMMED (to whom GOD be merciful!) the estate is divided among them in twenty-eight parts, to the two daughters twenty-two shares (sixteen in right of their father and six shares in right of their mother) and to the son six shares in right of his mother.

On the Second Class.

HE among them, who is preferred in the fuccession, is the nearest of them to the deceased, on which side soever he stands; and, in the case of equality in the degrees of proximity, then he, who is related to the deceased through an heir, is preferred by the opinion of ABU SUHAIL, surnamed ALFERAIDI, of ABU FUDAIL ALKHASSAF, and of ALI, the son of ISAI ALBASRI; but, no preference is given to him

according to ABU SULAIMAN ALJURJANI. and ABU ALI AL BAIHATHI ALBUSTI. If their degrees be equal, and there be none among them, who is related through an heir, or, if all of them be related through an heir, then, if the fex of those, through whom they are related, agree, and their relation be on the fame fide, the distribution is according to their perfons, but if the fex of those, to whom they are related, be different, the property is distributed according to the first rank that differs in fex, as in the first class; and, if their relation differ, then two thirds go to those on the father's side, that being the share of the father, and one third goes to those on the mother's fide, that being the share of the mother: then what has been allotted to each fet is distributed among them, as if their relation were the same.

On the Third Class.

The rule concerning them is the same with that concerning the first class; I mean, that he is preferred in the succession, who is nearest to the deceased: and, if they be equal in relation, then the child of a residuary is preferred to the child of a more distant kinsman; as, if a man leave the daughter of a brother's son, and the son of a sister's daughter, both of them by the same

father and mother, or by the same father, or one of them by the same father and mother, and the other by the same father only: in this case the whole estate goes to the daughter of the brother's fon, because she is the child of a residuary; and, if it be by the same mother only, distribution is made between them by the rule, " A male has "the share of two females," and, by the opinion of ABU YUSUF (to whom GOD be merciful!) in thirds, according to the persons, but, by that of MUHAMMED (may GOD be merciful to him!) in moieties according to the roots; and, if they be equal in proximity, and there be no child of a refiduary among them, or if all of them be children of reliduaries, or if some of them be children of residuaries, and some of them children of those entitled to shares, and their relation differ, then ABU YUSUF (to whom GOD be merciful!) confiders the strongest in confanguinity; but MUHAMMED (may GOD be merciful to him!) divides the property among the brothers and fifters in moieties, confidering as well the number of the branches, as the fides in the roots; and what has been allotted to each fet is distributed among their branches, as in the first class: thus, if a man leave the daughter of the daughter of a fifter by the fame father and mother, she is preferred to the son of the daughter of a brother by the same father only, according to ABU YUSUF (to whom GOD be merciful!) by reason of the strength of relation; but, according to MUHAMMED (may God be merciful to him!) the property is divided between them both in moieties by consideration of the roots. So, when a man leaves three daughters of different brothers, and three fons and three daughters of different sisters, as in this sigure:

The Deceased.

Sister_Sister_Brother_Brother_Brother

by the fame

Mother-Father-Father-Mother-Father-Father

and Mother

and Mother

Son Son Son Daughter Daughter Daughter Daughter Daughter Daughter.

In this case, according to ABU YUSUF, the property is divided among the branches of the whole blood, then among the branches by the same father, then among the branches by the same mother, according to the rule, "the male has the allotment of two semales," in fourths, by considering the persons; but, according to MUHAMMED (to whom GOD be merciful!) a third of the estate is divided equally among the branches by the same mother, in

thirds, by considering the equality of their roots in the division of the parents, and the remainder among the branches of the whole blood in moieties, by considering in the roots the number of the branches; one half to the daughter of the brother, the portion of the father, and the other between the children of the sister, the male having the allotment of two semales, by considering the persons; and the estate is correctly divided by nine. If a man leave three daughters of different brothers' sons, in this manner:

The Deceased.

Daughter — Daughter — Daughter

of a Son of a Brother by the same

Father and Mother — Father — Mother all the property goes to the daughter of the fon of the brother by the fame father and mother, by the unanimous opinion of the learned, fince the is the child of a refiduary, and hath also the strength of consanguinity.

On the Fourth Class.

THE rule as to them is, that, when there is only one of them, he has a right to the whole property, fince there is none to obstruct him;

and, when there are feveral, and the fides of their relation are the same, as paternal aunts and paternal uncles by the same mother with the father, or maternal uncles and aunts, then the stronger of them in confanguinity is preferred, by the general affent; I mean, they, who are related by father and mother, are preferred to those, who are related by the father only, and they, who are related by the father, are preferred to those, who are related by the mother only, whether they be males or females; and, if there be males and females, and their relation be equal, then the male has the allotment of two females; as, if there be a paternal uncle and aunt both by one mother, or a maternal uncle and aunt, both by the fame father and mother, or by the fame father, or by the same mother only: and if the sides of their consanguinity be different, then no regard is shown to the strength of relation; as, if there be a paternal aunt by the same father and mother, and a maternal aunt by the fame mother, or a maternal aunt by the same father and mother, and a paternal aunt by the fame mother only, then two thirds go to the kindred of the father, for they are the father's allotment, and one third to the kindred of the mother, for that is the mother's allotment; then what is allotted to each fet is divided among them, as if the place of their confanguinity were the fame.

On their Children, and the Rules concerning them.

THE rule as to them is like the rule concerning the first class; I mean, that the best entitled of them to the fuccession is the nearest of them to the deceased on whichever side he is related; and, if they be equal in relation, and the place of their confanguinity be the same, then he, who has the strength of blood, is preferred, by the general affent; and, if they be equal in degree and in blood, and the place of their confanguinity be the fame, then the child of a refiduary is preferred to whoever is not fuch; as, if a man leave the daughter of a paternal uncle, and the fon of a paternal aunt, both of them by the same father and mother, or by the same father, all the property goes to the daughter of the paternal uncle; and, if one of them be by the same father and mother, and the other by the same father only, then all the estate goes to the claimant, who has the strength of confanguinity, according to the clearer tradition; and this by analogy to the maternal aunt by the fame father, for though she be the child of a distant kinsman. yet she is preferred, by the strength of confanguinity, to the maternal aunt by the fame mother only, though she be the child of an heir; fince the weight which prevails by itself, that

is, the strength of consanguinity, is greater than the weight by another, which is the descent from an heir. Some of them (the learned) fay, that the whole eftate goes to the daughter of the paternal uncle by the same father, since she is the daughter of a refiduary; and, if they be equal in degree, yet the place of their relation differ, they have no regard shown to the strength of consanguinity, nor to the descent from a residuary. according to the clearer tradition; by analogy to the paternal aunt by the same father and mother, for though she have two bloods, and be the child of an heir on both fides, and her mother be entitled to a legal share, yet she is not preferred to the maternal aunt by the same father; but two thirds go to whoever is related by the father; and their regard is shown to the strength of blood; then to the descent from a refiduary; and one third goes to whoever is related by the mother, and there too regard is shown to strength of consanguinity: then, according to ABU YUSÚF (may GOD be merciful to him!) what belongs to each fet is divided among the persons of their branches, with attention to the number of sides in the branches: and, according to MUHAMMED (may GOD be merciful to him!) the property is distributed by the first line, that differs, with attention to the number of the branches and of the fides in

the roots, as in the first class; then this rule is applied to the sides of the paternal uncles of his parents and their maternal uncles; then to their children; then to the side of the paternal uncles of the parents of his parents, and to their maternal uncles; then to their children, as in the case of residuaries.

On Hermaphrodites.

To the hermaphrodite, whose sex is quite doubtful, is allotted the smaller of two shares, I mean the worse of two conditions, according to ABU HANI'FAH (may GOD be merciful to him!) and his friends, and this is the doctrine of the generality of the Prophet's companions (may GOD be gracious to them!) and conformable to it are decisions given; as, when a man leaves a fon, and a daughter, and an hermaphrodite, then the hermaphrodite has the share of a daughter, fince that is afcertained: and, according to AAMIR ALSHABI (and this is the opinion of IBNU ÂBBÁS, may GOD be gracious to them both!) the hermaphrodite has a moiety of the two shares in the controversy; but the two great lawyers differ in putting in practice the doctrine of ALSHABI: for ABU YUSUF fays, that the fon has one share, and the daughter half a

share, and the hermaphrodite three fourths of a share, fince the hermaphrodite would be entitled to a share, if he were a male, and to half a share, if he were a female, and this is fettled by bis taking half the sum of the two portions; or, we may fay, he takes the moiety which is ascertained, together with half the moiety which is disputed, so that there come to him three fourths of a share: for he (ABU YUSUF) pays attention to the legal share and to the increase, and he verifies the case by nine: or, we may say, the son has two shares, and the daughter one share, and the hermaphrodite a moiety of the two allotments, and that is a share and half a share. But MU-HAMMED (may GOD be merciful to him!) fays, that the hermaphrodite would take two fifths of the estate, if he were a male, and a fourth of the estate, if he were a female, and that he takes a moiety of the two allotments, and that will give him one fifth and an eighth by attention to both fexes; and the case is rectified by forty; fince that is the product of one of the numbers in the two cases, which is four, multiplied into the other, which is five, and that produst multiplied by two (which is the number of the) cases; and then he, who takes any thing by five, has it multiplied into four, and he, who takes any thing by four, bas it multiplied into

five; so that thirteen shares go to the hermaphrodite, and eighteen to the son, and nine to the daughter.

On Pregnancy.

THE longest time of pregnancy is two years, according to ABU HANI'FAH (may GOD be merciful to him!) and his companions; and according to LAITH, the fon of SAD ALFAHMI (may GOD be merciful to him!) three years; and, according to ALSHAFII (may GOD be merciful to him!) four years: but according to ALZUHRI (may GOD be merciful to him!) feven years: and the shortest time for it is fix There is referved for the child in the months. womb, according to ABU HANIFAH (may GOD be merciful to him!) the portion of four fons, or the portion of four daughters, whichever of the two is most; and there is given to the rest of the heirs the smallest of the portions; but, according to MUHAMMED (may GOD be merciful to him!) there is referved the portion of three fons or of three daughters, whichever of the two is most: LAITH, fon of SAD, (may GOD be gracious to him!) reports this opinion from him; but, by another report, there is reserved the portion of two fons; and one of

the two opinions is that of ABU YUSUF (may GOD be merciful to him!) as HISHAM reports it from him; but ALKHASSAF reports from ABU YUSUF (may GOD be merciful to him!) that there should be reserved the share of one fon or of one daughter; and, according to this, decisions are made; and security must be taken, according to his opinion. And, if the pregnancy was by the deceased, and the widow produce a child at the full time of the longest period allowed for pregnancy, or within it, and the woman hath not confessed her having broken her legal term of abstinence, that child shall inherit, and others may inherit from him; but, if she produce a child after the longest time of gestation, he shall not inherit, nor shall others inherit from him: and if the pregnancy was from another man than the deceased, and she, the kinfwoman, produce a child in fix months or less, he shall inherit; but, if she produce the child after the least period of gestation, he shall not inherit.

Now the way of knowing the life of the child at the time of its birth, is, that there be found in him that, by which life is proved; as a voice, or fneezing, or weeping, or fmiling, or moving a limb; and, if the fmallest part of the child come out, and he then die, he shall not inherit; but if the greater part of him come out, and then he die, he shall inherit: and, if he come out straight (or with his head first) then his breast is considered; I mean, if his whole breast come out, he shall inherit; but if he come out inverted (or with his feet first) then his navel is considered.

The chief rule in arranging cases on pregnancy is, that the case be arranged by two suppositions, I mean by supposing, that the child in the womb is a male, and by supposing, that it is a female: then, compare the arrangement of both cases; and, if the numbers agree, multiply the measure of one of the two into the whole of the other; and, if they disagree, then multiply the whole of one of the two into the whole of the other, and the product will be the arranger of the case: then multiply the allotment of him, who would have something from the case, which supposes a male, into that of the case, which supposes a female, or into its measure: and then that of him, who takes on the suppofition of a female, into the case of the male, or into its measure, as we have directed concerning the hermaphrodite; then examine the two products of that multiplication; and whether of the two is the less, that shall be given to fuch an heir; and the difference between them must be reserved from the allotment of that

heir; and, when the child appears, if he be entitled to the whole of what has been referved. it is well; but, if he be entitled to a part, let him take that part, and let the remainder be distributed among the other heirs, and let there be given to each of those heirs what was referved from his allotment: as, when a man has left a daughter and both his parents, and a wife pregnant, then the case is rectified by twenty-four on the supposition, that the child in the womb is a male, and by twenty-feven on the supposition, that it is a female: now between the two numbers of the arrangement there is an agreement in a third; and when the meafure of one of the two is multiplied into the whole of the other, the product amounts to two hundred and fixteen, and by that number is the case verified; and, on the supposition of its male fex, the wife takes twenty-feven shares, and each of the two parents, thirty-fix; but, on the supposition of its female sex, the wife has twenty-four, and each of the parents, thirty-two; and twenty-four are given to the wife, and three shares from her allotment are reserved; and from the allotment of each of the parents are referved four shares; and thirteen shares are given to the daughter; fince the part referved in her right is the allotment of four fons, according to ABU HANÍFAH (may GOD be

merciful to him!) and when the fons are four, then her allotment is one share and four ninths of a fhare out of four-and-twenty multiplied into nine, and that makes thirteen shares; and this belongs to her, and the residue is reserved, which amounts to an hundred and fifteen shares. If the widow bring forth one daughter or more, then all the part referved goes to the daughters; and, if she bring forth one son or more, then must be given to the widow and both parents what was referved from their shares: and what remains must be divided among the children: and, if she bring forth a dead child, then must be given to the widow and both parents what was referved from their shares, and to the daughter a complete moiety, that is, ninetyfive shares more, and the remainder, which is nine shares, to the father, since he is the residuary.

On a Lost Person.

A Lost person is considered as living in regard to his estate; so that no one can inherit from him; and his estate is reserved, until his death can be ascertained; or the term for a presumption of it has passed over: now the traditionary opinions differ concerning that term; for, by the clearer tradition, "when, not one of his equals in age remains, judgement may

" be given of his death;" but HASAN, the fon of ZIYAD, reports from ABU HANIFAH (may GOD be merciful to him!) that the term is an hundred and twenty years from the day on which he was born; and MUHAMMED fays, an hundred and ten years; and ABU YUSUF fays, an hundred and five years; and fome of them, the learned, fay, ninety years; and according to that opinion are decisions made. Some of the learned in the law fay, that the estate of a lost person must be reserved for the final regulation of the Imam, and the judgement fuspended as to the right of another person, so that his share from the estate of his ancestors must be kept, as in the case of pregnancy; and, when the term is elapsed, and judgement given of his death, then his estate goes to his heirs, who are to be found, according to the judgement on his decease; and, what was reserved on his account from the estate of his ancestor. is restored to the heir of his ancestor, from whose estate that share was reserved: since the lost person is dead as to the estate of another.

The principle in arranging cases concerning a lost person is, that the case be arranged on a supposition of his life, and then arranged on a supposition of his death; and the rest of the operation is what we have mentioned in the chapter of pregnancy.

On an Apostate.

WHEN an apostate from the faith has died naturally, or been killed, or passed into a hostile country, and the Kádi has given judgement on his passage thither, then what he had acquired, at the time of his being a believer, goes to his heirs, who are believers; and what he has gained fince the time of the apostasy is placed in the publick treasury, according to ABU HANÍ-FAH (may GOD be merciful to him!) but, according to the two lawyers (ABU YÚSUF and MUHAMMED) both the acquisitions go to his believing heirs; and, according to AL-SHÁFIÍ (may GOD be merciful to him!) both the acquisitions are placed in the publick treafury; and what he gained after his arrival in the hostile country, that is confiscated by the general confent; and all the property of a female apostate goes to her heirs, who are believers, without diversity of opinion among our masters, to whom God be merciful! but an apostate shall not inherit from any one, neither from a believer nor from an apostate like himfelf, and so a female apostate shall not inherit from any one; except when the people of a whole district become apostates altogether, for then they inherit reciprocally.

On a Captive.

THE rule concerning a captive \dot{i} like the rule of other believers in regard to inheritance, as long as he has not departed from the faith; but, if he has departed from the faith, then the rule concerning him \dot{i} the rule concerning an apostate; but, if his apostasy be not known, nor his life nor his death, then the rule concerning him \dot{i} the rule concerning a lost person.

On Persons drowned, or burned, or overwhelmed in Ruins.

WHEN a company of persons die, and it is not known which of them died first, they are considered, as if they had died at the same moment; and the estate of each of them goes to his heirs, who are living; and some of the deceased shall not inherit from others: this is the approved opinion. But ALI and IBNU MASUUD say, according to one of the traditions from them, that some of them shall inherit from others, except in what each of them has inherited from the companion of his sate.

COMMENTARY

Kakan tahun 1

THE SIRÁJIYYAH.

IN our administration of justice to Mohammedans according to their own laws, it will be of no use to inquire, what their legislator meant by declaring, that the law of inheritances constituted one half of juridical knowledge*: if he intended any thing more than a strong affertion of its importance, he probably had in contemplation the two general modes of acquiring property, contracts and succession, or the agreement of parties and the operation of law; and this explanation of the phrase, which had occurred to me on my first perusal of it, is also suggested by Sayyad SHARIF, together with a more fanciful interpretation, which Máulavi KASIM has adopted, that, life and death being incident to our probationary state in this world, and the

law of fuccession manifestly relating to the dead, it is properly opposed to all other laws, which prescribe the duties and ascertain the rights of the living; but we merely take notice of the sentence, that no part of the Sirájiyyah may be unexplained, and proceed to the four acts, which, on the decease of a Mohammedan, are to be successively performed by the magistrate, or under his authority.

I. A regard to public decency and convenience, as well as to publick religion and health, feems in all nations to require, that the bodies of deceased persons be removed out of fight, with all due speed and solemnity, at a moderate expense to be defrayed, even before the payment of their just debts, out of the property left by them, on which no legal claim, from hypothecation or otherwise, had previously attached: but the Muselman lawyers, who admit, that the funeral charges must in the first place be defrayed, affign a very whimfical reason for fuch a priority; because, they say, the windingsheet and other clothes of the dead are analogous to fuitable apparel worn by the living, and confequently should not be liable to the claims of a creditor. The legal expenses of burying a Mohammedan are very moderate, both in the number and value of the clothes, in which the deceased is to be wrapped: as more than three pieces of

cloth for a man, or than five pieces for a woman, would be held a prodigal fuperfluity, and less than those, a niggardly deficiency, of expense, so, if the funeral clothes of AMRU or HINDA were dearer than the vesture usually worn by them, when alive, it would be a culpable excess; and if cheaper, a blameable defect; but, if in fact they had been used to wear one fort of apparel on folemn festivals, another in vifiting their friends, and a third, in their own houses, the value of their visiting dress must regulate that of their burial, and either extreme would be too prodigal or too parfimonious. Should their debts, indeed, cover the whole of their property, the legal expense of the funeral must be reduced to the Sufficient expense, as it is called; that is, to two pieces of cloth for AMRU and to three for HINDA: the names, dimensions, and uses of all the cloths used in funerals, both for men and for women, are enumerated in Persian by Maulavi KASIM; but it would be useless to mention them; and it feems only necessary to add on this article, that if deceased persons leave no property whatever, or none without a special lien on it, the funeral expenses must be paid by fuch of their relations, as would have been compellable by law to maintain them, when living; and, if there be no fuch relations, by the publick treafury, in which there is always an ample fund arifing from forfeitures and escheats.

II. After the burial, all the just debts of the deceased must be paid out of his remaining assets, as far as they extend; and, if there be many creditors, they must be satisfied in equal proportion, except that a debt of health, to use the Arabian phrase, must be discharged before a debt of sickness; that is, a debt contracted or acknowledged, while the party was of found understanding and body, is preferred, when legally proved, to one acknowledged in fickness, but of which no other evidence is produced. A religious vow, or promise of a charitable donation, as an atonement for fin, constitutes a debt in conscience only; and the sum thus promised must be paid out of a third part of the assets, after the legal creditors have been satisfied, provided that it was bequeathed by will; but, if no will was made, the temporal estate shall not be charged with a mere debt of religion.

III. The legacies of a Muselman, to the prejudice of his heirs, must not exceed a third part of the property lest by him, and remaining after the discharge of his debts: over a third of such residue he has absolute power; and his legatee shall receive it immediately, whether a specifick thing or certain sum of money, or only a fractional part of his estate, was bequeathed. This is the opinion of SHARIF; though a distinction, which the text by no means implies, has been taken between a determinate and an indeterminate legacy.

IV. We come now to the distribution of his estate, remaining after the payment of debts and legacies, among his beirs (for so we may call them, although real and personal property are undistinguished in the laws of the Arabs) according to certain rules derived from three sources, the Korán, the genuine system of oral traditions from the legislator, and those opinions in which the learned and orthodox have generally concurred *: the order, and proportions, in which the property of AMRU or HINDA must be distributed, constitute the principal subject of the work, which we have undertaken to explain.

- 1. The first class of beirs are they, who may be called *sharers*, because a certain *share* of the estate is expressly allotted to each of them in the *Korán*, and particularly in the *fourth* chapter of it.
- 2. Next come they, who may be diffinguished by the name of residuaries, because they take the residue after the shares have been duly distributed; and they are of two sorts, residu-

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aries by consanguinity and residuaries for special cause, the former of whom are preserved in the order of succession; the latter are the masters or mistresses of enfranchised slaves, or their male residuary heirs. If no sharers be living, the residuaries take the whole; but, if there be sharers by consanguinity and no residuaries, a farther portion of the inheritance reverts to them, though never to the widower or to the widow, while any heirs by blood are alive.

3. On failure of the two preceding classes, the distribution is made among those next of kin, who are neither sharers nor residuaries:

they may be called the distant kindred.

4. Should none of the distant kindred be living and capable of inheriting, the estate goes (unless there be a widow or a widower, who is first entitled to a share) to him, who may be called the successor by contract; and of that succession it is necessary to give an example: if Amru, a man of an unknown descent, say to Zaid, "Thou art my kinsman, and shalt be my successor after my death, paying for me any fine and ransom, to which I may become liable," and Zaid accept the condition, it is a valid contract by the Arabian law; and, if Zaid also be a man whose descent is unknown, and make the same proposal to Amru, who likewise accepts it, the contract is mutual and

fimilar, and they are fuccessors by contract reci-

AMRU in his life time had acknowledged ZAID, a man of an unknown pedigree, to be his brother or his uncle, that is, to be related to him by his father or by his grandfather, though in truth he had no such relation, and the bare acknowledgment of AMRU cannot be admitted as a proof of it, yet, if AMRU die without retracting his declaration, ZAID is called the acknowledged kinsman by a common ancestor, and stands in the fifth class of successors, but takes the estate before the general divisee.

6. Last of all comes the person, to whom the deceased had lest the whole of his property by a will duly made and proved; for, though the law secures to his heirs of the five preceding classes two thirds of his estate, yet it so far respects his dominion, while he lived, over his own property, and his will as to the disposal of it after his decease, that it will rather give effect to an intention not strictly conformable to law (for the Korán seems to allow pious bequests only), than suffer his estate to escheat; which must be the consequence of his dying without a representative. All such escheats to the sovereign go towards a fund for charitable uses; and according to the system of Zaid, the son of Tha-

BIT, which has been shortly explained in a former publication, that fund, if it be regularly established, is entitled to the whole estate on failure of residuary heirs, without any return to the sharers, and to the entire exclusion of the four last classes; but this doctrine seems quite exploded.

Before we proceed to the law of *shares*, it is proper to take notice of the four impediments to fuccession; which are flavery, homicide, difference of religion, and difference of country, or of allegiance; the last of which disabilities relates only to such as are not *Mufelmans*.

1. Slavery, by the Mohammedan law, is either perfect and absolute, as when the flave and all, that he can posses, are wholly at the disposal of his master, or imperfect and privileged, as when the master has promised the slave his freedom on his paying a certain sum of money by easy instalments, or, without any payment, after the death of the master: a semale slave, who has borne a child to her master, is also privileged; but in both sorts of slavery, as long as it continues, the slave can acquire no property, and consequently cannot inherit. The Arabian custom of allowing a slave to cultivate a piece of land, or set up a trade, on his own account, so that he may work out his manu-

mission by prudence and industry, and by degrees pay the price of his freedom, may suggest an excellent mode of enfranchising the black slaves in our plantations, with great advantage to our country and without loss to their

proprietors.

2. Homicide is either with malice prepense and punishable with death, or without proof of malice, and expiable by redeeming a Muselman flave, or by fasting two entire months, and by paying the price of blood; or, thirdly, it is accidental, for which an expiation is necessary. Malicious homicide, or murder (for, by the best opinions, the Arabian law on this head nearly resembles our own) is committed, when a human creature is unjustly killed with a weapon, or any dangerous inftrument likely to occasion death, as with a sharp stick or a large stone, or with fire, which has the effect, fays KA'SIM, of the most dangerous instrument, and, by parity of reason, with poison or by drowning; but those two modes of killing are not specified by him; and there is a strange diversity of opinion concerning them: killing without proof of malice is, when death enfues from a beating or blow with a flight wand, a thin whip, or a fmall pebble, or with any thing not ordinarily dangerous: accidental death is, when it was neither defigned nor could have been prevented

by ordinary care, as if AMRU were to shoot an arrow at a wild beaft, and the arrow by accident were to kill ZAID, or if MAZIN were to fall from his terrace upon Zuhair and kill him by his fall; in which cases the slayer would not be permitted to inherit from the flain. If, however, a man were to dig a pit, or fix a large stone, on the field of another, and the owner of the field were to be killed by falling at night into the pit, or running against the stone, the doer of the illegal act, which was the primary occasion (but not the cause) of the death, must pay the price of blood, but would not, it feems, be disabled from succeeding to the property of the deceased, whom he could not in strictness be faid to have killed.

- 3. An unbeliever shall never be heir to a believer, nor conversely; but infidel subjects may inherit from infidels.
- 4. The difference between two states or countries consists in the difference of sovereigns, by whom protection is given to their respective subjects, and to whom allegiance is respectively due from them: this difference is particularly marked between a country governed by a Mobammedan power and a country ruled by a prince of any other religion; for they are always, virtually at least, in a state of warfare, the first being called by lawyers the seat of pease,

and the second, the seat of hostility. A difference of country, therefore, which excludes from the right of inheriting, is either actual and unqualified, as when an alien enemy refides in the feat of bostility, or when an alien has chosen his domicil in the feat of peace, and pays the tribute exacted from infidels, in which cafe the tributary shall not be heir to the alien enemy dying abroad, nor conversely, because each of them owed a separate allegiance; or the difference is qualified*, as when a fugitive enemy feeks quarter, and obtains a temporary refidence in the feat of peace, or when two alien enemies are fugitives from two different hostile countries: now, although the tributary and the fugitive actually live in the same kingdom, yet, fince the fugitive continues a subject of the hostile power, he remains, as it were, under a different government, and there is no mutual right of fuccession between him and the tributary; nor, by fimilarity of reason, between two fugitives, who leave two distinct hostile governments, and obtain quarter for a time in the land of believers, but without any intention of making it their constant abode.

IF none of these four incapacities preclude the heirs of Amru from the legal succession to his estate, which we will suppose already sold and

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reduced to money of one denomination, the magistrate, or his officer, must proceed to the distribution of the *shares*; and, as they are a moiety, a fourth, an eighth, two thirds, one third, and a fixth, of the aggregate sum, it will be convenient at first to consider that sum as consisting of twenty-four equal parts, so that the shares will be, in whole numbers, twelve, fix, three, fixteen, eight, and four.

THE sharers are twelve persons, four males and eight females; but, before we specify their respective allotments, it is necessary to premise that a grandfather and a grandmother, according to the Arabian idiom, fignify a male, and a female, ancestor in any degree; that a true grandfather is he, between whom and the deceased no female ancestor intervened; that a false grandfather is, where the paternal line of ascent was broken by the intervention of a female; and that a grandmother also is called true, when no false grandfather intervened between her and the deceased: in short, the only true line of ancestry, according to the Arabs, is an uninterrupted succession of paternal forefathers. The male sharers then are the father, the true grandfather, the brother by the same mother only, and the widower: the females are the widow, the daughter, the female issue of the son, the sister of the whole blood, the fifter by the same father only,

the fister by the same mother only, the mother herself, and the true grandmother.

We begin with the males in the order of the shares before enumerated; and, 1. The father of Amru or Hinda takes * a fixth absolutely, though a fon of the deceased be living, or any male descendant, who claims wholly through males; but, if there be no fuch male descendant, he becomes a refiduary heir; and, if there be only a daughter of the deceased, or a female descendant from the son, he first has his legal share, or a fixth, and, when her share also has been allotted, he claims the refidue. 2. The true grandfather is excluded from any share by the living father, through whom alone the grandfather bore a relation to the deceased; and, although a fimilar reason might afterwards be applied to the mother, and operate to the exclusion of her children, yet the father has the additional strength of a double title, both as a sharer and a residuary: but, if the father also be dead, his father, or true paternal anceftor, has exactly the same interest, except in four cases, which will be presently mentioned. A fingle half-brother, by the same mother only, takes a fixth, and two or more such halfbrothers, a third; provided that the deceased

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left neither children, nor male issue of a son, nor a father, nor a true grandfather; by any of whom the brothers by the same mother are excluded; and this article brings us necessarily to one class of female sharers; for, in this instance, there is no distinction of sex; both brothers and sisters by the same mother only having an equal right and an equal share in the distribution. 4. A moiety of HINDA's estate, if she die without children, or the issue of a deceased son, goes to her widower AMRU, who, if she leave such issue, has no more than a fourth.

As examples of the father's rights, let us suppose Amru to have died worth two thoufand four hundred pieces of gold, leaving his father ZAID, and either a fon or a fon's fon. OMAR: in this case the four hundred pieces are the share of ZAID, and OMAR takes the remaining two thousand; but, if AMRU leave only his father ZAID and either a daughter, or Ion's daughter, LAILA, the father is first entitled to the four hundred pieces, or fixth part; and, after LAILA has received twelve hundred, or a moiety of the estate (which, as we shall see, is her share in this case), he takes, as residuary, the eight hundred pieces, which remains; fo that the property of Amru is equally divided between them. Should no relation be left but ZAID the father, and LEBID the brother, of the

deceased, LEBID is excluded; and the whole estate goes to ZAID. If, in the three preceding cases, the paternal grandfather SALIM had been left instead of ZAID, his rights would have been precisely the same; and the only difference between ZAID and SALIM will appear from the four following examples. The paternal grandmother would be excluded by ZAID her son, but not by his father, her husband, SALIM. 2. If AMRU or HINDA leave a father ZAID, a mother SOLMA, and a widow ZAINEB, or widower HARETH, the mother takes a third part of what remains after ZAINEB or HARETH has received the legal share; but, if SALIM be substituted for ZAID, she would have a right to a third of the whole assets, according to the prevailing opinion, although ABU Yusur thought her entitled, even in that case, to no more than a third of the remainder. 3. The brothers of the whole blood, and those by the same father only, are excluded from the inheritance by ZAID the father, but not by the grandfather SALIM, as the best lawyers agree, diffenting on this point from their master Abu Hanifah. 4. If Amru had manumitted his flave YASMIN, and died, leaving his father ZAID and a son OMAR, a fixth part

of the right of succession to Ya'smin would have vested, according to Ab'u Yu'suf, in Zaid, but, if the paternal grandfather Sa'lim had been lest instead of the father, the whole interest would have vested in the son: in this case that illustrious lawyer ultimately dissented from his master and from his fellow-student Muhammed, who were both very justly of opinion, that, whether Zaid or Sa'lim were alive on the death of the manumittor, the whole right of succession to the manumittee vested in Omar.

Let us proceed to the shares of the females; and I. If AMRU die without children, and without any iffue of a deceased son, his widow HINDA must receive a fourth of his assets; but her share is an eighth only *, if any such issue be living: should he leave more widows than one, they take equal parts of fuch fourth or eighth; fo that the legal share of the widower is always in a double ratio to that of the widow or widows: as, if HINDA die worth twentyfour thousand zecchins, her surviving husband Amru must be entitled either to twelve or to fix thousand; and if AMRU die with the same estate, his widow HINDA must have either fix or three thousand for her sole share; or, if ZAINEB and ABLA had also been legally married to Amru, the three widows must receive

^{*} Page 217.

either tiwe or one thousand zecchins each, as the case may happen. 2. One daughter takes a moiety, and two or more daughters have two thirds, of their father's estate; but, if the deceased left a fon, the rule, expressed in the Koran, is this: "to one male give the portion of two "females;" and the daughters in that case are not properly sharers, but residuary heirs with the fon, their part of the inheritance being always in a fubduple ratio to his part. Thus, if Amru die worth twenty-four thousand pieces of gold, his only child FATIMA takes twelve thousand as her share; but, if she have three fisters, Azza, LATIFA, and ZUBAIDA, two thirds of the affets, or fixteen thousand pieces. are equally divided between the four girls; and if there be a fon OMAR, he must receive, in the first case, sixteen thousand, while FA'TIMA has eight; and, in the second, eight thousand, while she and her sisters take each four thoufand, pieces. 3. If OMAR had died before his father, leaving female iffue, and his father had then died without any daughter of his own, the daughters of OMAR would have had precifely the same shares, to which those of AMRU himfelf would have been entitled; but, had FA'TI-MA been living, she would have taken half the estate, or twelve thousand pieces of gold, and a fixth only, or four thousand, the complement of two thirds or fixteen thousand, would have

been equally distributed among her nieces. Had FA'TIMA and Azza been at that time alive, they would have taken their legal share, to the exclusion of their brother's female issue, unless the right of that issue had been sustained by a male in an equal, or a lower degree, who would have made them residuaries, " the male " taking, by the rule, the portion of females;" but a male in a higher degree would not have given them that advantage; and, if OMAR himself had survived, his daughters would have been wholly excluded. The fix cases, therefore, or different fituations, of the female issue of OMAR may be thus recapitulated: I. A fingle female takes a moiety. 2. Two or more have two thirds. 2. A male in the same, or a lower, degree than themselves, gives them a residuary right in a subduple ratio to his own. 4. With a daughter of Amru, who is entitled to half, they would have only a fixth, to make up the regular share of the female issue. 5. They are excluded, if AMRU left more daughters than one, but no male iffue in any equal, or a lower, degree. 6. A fon also of Amru wholly excludes them. In the three first cases, their legal claims correspond with those of daughters: but in the three last their rights are weaker, because they are in a remoter degree from the deceased.

The pedigree exhibited in the text* is called by the Arabs the tashbib, because, in their opinion, it sharpens the understanding, and captivates the fancy as much as the composition of an elegant love-poem, which the word literally fignifies; but, without adopting so wild a metaphor, we may truly fay, that it is very perspicuous, and that no comment, after what has been premised, could render it clearer. An example, however, will show more distinctly than an abstract rule, in what manner an estate is divisible, when a male descendant gives a refiduary title to a female in the same, or in a higher, degree. Call the only furviving male descendant OMAR, and suppose him to be the brother of AMINA, who stands lowest in the first set of females: here the highest female in that set must receive a moiety of the affets; the next below her takes a fixth together with the highest of the second set, as the complement of two thirds; and the residue must be divided into five portions, of which OMAR claims two and each of the females in the same degree, one; but the three females below them are excluded. If OMAR be the brother of ZARI'FA, whom we suppose the lowest of the middle set, the remaining third of the estate must be distributed in sevenths,

because there are five females, three in a higher, and two in an equal, degree with OMAR, who must always have a double portion; and, if he be the brother of UNAIZA, the lowest female of the third fet (who, on the former supposition, would have been excluded), there will be fix female residuaries entitled to portions with OMAR, but in a fubduple ratio; fo that, if Amru died worth twenty-four thousand ducats, the daughter of his fon takes twelve thoufand of them; the two daughters of his fons' fons receive each two thousand; and, the residue being eight, OMAR is entitled also to two thousand ducats, while UNAIZA and the five women, who remain, have each one thousand, which they owe to the fortunate existence of OMAR. 4.* The rights of fisters by the same father and mother, and (5.) those of fifters by the same father only, are explained in the text with fufficient clearness, but it is proper to obferve, that the fifth case of the first class is comprised in the feventh case of the second; and that (6.) the fifters by the same mother have been mentioned in a former section. There will be no use in repeating the ingenious arguments of IBNU ABBAS in support of his diffent on many points from other old lawyers, nor the

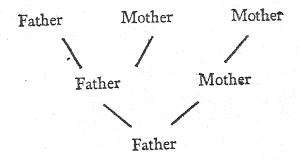
^{*} Page 219.

folid answers, which have been given to his objections; but a story, told by SHARIF, may here be repeated, because it conveys an idea of the traditionary Arabian law, and shows from what fources our excellent author derived his doctrine: 'HUDHAIL used to relate, that ABU Musa, being confulted on the distribution of an heritage among a daughter, a fon's daughter, and a fifter, answered, the first must have a moiety; the second a fixth; and the third, " what remains; but " Confult IBNU MASUUD, "added he, and apprize me of his answer:" when IBNU MASUUD, was confulted, he faid, that he was prefent, when MUHAMMED himfelf gave the fame decision; and, when that answer was reported to ABU MUSA, he faid, "you must put no questions to me, as long as-"that illustrious lawyer remains with you." 7. * Although the different rights of the mother in different cases be very clearly explained, yet her title to a third of the refidue may be illustrated by two examples: first, if ADHRA leave only her husband WAMIK, her mother SÔADA, and her father MAZIN, half of her estate goes to Wamik, a third of the other half, or a fixth of the whole, to SôADA, and the remainder to

^{*} Page 220.

MAZIN; but, fecondly, if WAMIK leave only his wife Adhra, his mother Zaineb and his father Lebid, the widow takes a quarter of his property, while Zaineb has a third, and Lebid two thirds, of the remaining three quarters.

8. In giving an example of the division between two great grandmothers *, we may anticipate in some degree the arithmetical part of the work, which will be found extremely clear and ingenious. The pedigree exhibited by Sharif is in this form:



Now the paternal grandmother's mother, and the mother of the paternal grandfather, are together entitled to a fixth, and the paternal grandfather's father to the residue, of the estate, which ought, by the general rule, to be divided into fix parts, because six is the denominator of the share; but, to avoid a fraction, we must

^{*} Page 221.

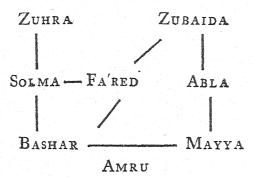
observe the proportion of one, or the fixth part, to two, or the number of persons entitled to it; and, since one and two are prime to each other, we must multiply two into six, and the product is the number of parts into which the property must be divided; so that of twelve cows or horses the great grandfather will have ten, and each of the great grandmothers, one.

The great grandfathers are called ancestors in the *fecond*, and their fathers, ancestors in the *third*, degree, and so forth; and it must be remarked that in these tables the number of *female* ancestors, who inherit with the *males*, is equal to the number of such degrees: thus in the following,

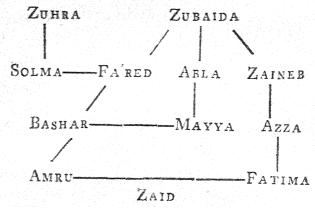
there are three great great grandmothers, and the estate must be divided into eighteen parts, because one and three are prime to each other. We suppose in both pedigrees, that the highest line only are lest by the deceased Amru; for, by the text, the nearest female ancestor excludes the more distant; and, if he leave his father Zuhair, and his paternal grandmother Azza, with Lahla his maternal grandmother's mother,

ZUHAIR takes the whole inheritance; for he excludes AZZA, and she, being nearer in degree, excludes LAILA.

Let us conclude the subject with a case put by Sharif in illustration of the pedigree in the text: ZUBAIDA gave her daughter's daughter Mayya in marriage to her son's son Bashar, and the young pair had a son Amru, who acquired an estate, and died: now Zubaida was both paternal and maternal great grandmother of Amru, and had, therefore, a double relation to him; but another woman, named Zuhra, had married her daughter Solma to Fared, who was the son of Zubaida, brother of Abla, and sather of Bashar; so that Zuhra was Amru's paternal grandmother's mother, and had only a single relation; as it will appear by the following arrangement of the samily:



The case of a *triple* relation will be no less evident from the following pedigree:



For, if AMRU, whom in the former case we supposed to be dead without issue, had lived and married his cousin FATIMA, by whom he had a son ZAID, who died leaving property, ZUBAIDA would have a triple relation to the deceased; first, as his maternal great grandmother's mother; secondly, as his paternal grandmother's grandmother; and thirdly, as the mother of his paternal great grandfather; but Zuhra has only a single relation to Zaid, as grandmother of his paternal grandfather Bashar.

In both these cases a sixth of the assets is divided equally between the two semale ancestors, by the opinion of Abu Yusuf, and, according to one authority, by that of his great master also; but his fellow-student Muhammed (whose arguments, and the answers to them, it is needless to add) contended, that

ZUBAIDA would be entitled in the first case to two-thirds, and in the second, to three-fourths, of that fixth part, according to the number of modes, in which she was related to AMRU or ZAID.

No comment could add perspicuity to the chapter on residuary beirs *, until we come to the cases of inheritance from enfranchised flaves +, where a short elucidation of the text appears necessary. If AMRU enfranchise NER-GIS, and die, leaving a son BECR, and a daughter LAILA; then, on the death of NERGIS without residuary heirs by blood, his property goes wholly to BECR, and LAILA, by the traditionary rule, takes nothing; but, suppose LAILA herself to manumit her black slave, Susen, who then purchases a slave Misc, and gives him freedom; and suppose Susen first, and Misc afterwards, to die without residuary heirs, in this case the estate of Misc goes to LAILA; nor would there be any difference, if the two manumissions had been conditioned to pay a certain fum of money at a certain time. The case of a manumission promised on the death of the mistress, has rather more difficulty; but an example will make it clear: LAILA promises NERGIS, that, on her death, he shall

^{*} Page 222.

be free; but, by the persuasion of a Christian friend, she renounces her faith, and feeks refuge in a hostile country: now a believer cannot be the flave of an infidel; and the Mohammedan judge pronounces accordingly, that NER-GIS has gained his freedom; but LAILA, repenting of her apostaly, returns to her native country and her former belief; after which NERGIS dies without heirs: LAILA succeeds as refiduary to her promifee, as she would have succeeded to a flave of NERGIS purchased after the decision of the judge, if a similar promise of manumiffion at his death had been made by the master; and if that second promisee had died without heirs after her repentance and re-Should CAFUR, a flave of LAILA, marry, with her consent, MERJANA, the freedwoman of AMRU, the fon of that couple would be born free, because, in respect of freedom or flavery, a child has the condition of its mother, and he bears a relation to AMRU her manumittor; but should LAILA give CAFUR his freedom, he would draw that relation from AMRU. through himself, to LAILA, so that she would fucceed to the fon of CAFUR and MERJANA. if he died after his parents and without other heirs of the first or second class: the case would be similar, if CAFUR being enfranchised, had bought a flave Misc, and given him in marriage to the freedwoman of Zaid; for, if the iffue of that marriage had been a fon, born free, but with a relation to Zaid, and if Cafur had then given Misc his liberty, he would have drawn from Zaid the relation of his freedman's child, and transferred it, through himself, to Laila his former mistress. This doctrine of a relation (as the Arabs call it) first vested through the mother and then devested through the father, is founded on a decision of Othman in the case of Zubair and Rafi.

We had occasion before, to mention the difference (according to ABU YUSUF) between the father, and the grandfather, of the manumittor in regard to their succession, with his fon, to the property of a freedman; nor can any thing of moment be added here; but it will be proper to explain at large the concluding cafe in the chapter of residuaries, which proves, that the relation of enfranchisement may arise by the act of law as well as by the act of the party. Let it be premifed, that marriage is prohibited between kindred of two classes; first, between all those in afcending or descending lines of consanguinity, who are called near; fecondly, between brothers and fifters, and their issue, or between nephews or nieces and aunts or uncles, paternal

or maternal, who are called intermediate; but, between those of the third, or distant, class, as the first or other cousins, there is no prohibition: now, if AMRU or HINDA purchase a kinfwoman or kinfman within either of the probibited degrees, the flave becomes inflantly free, and a right of fuccession vests in the purchasor, though the mastership began and ended in one moment. Call the three daughters of HARETH a flave, ZUBAIDA, SAFIYA, AMINA, who derived freedom from their mother, and two of whom, the first and third, purchase HA-RETH for fifty pieces of gold: he becomes in that instant free; and, if he die leaving property, two thirds of it go to his three daughters as their legal shares, and the residue belongs to the two, who procured him liberty; three fifths of it to ZUBAIDA, who contributed her thirty, and two fifths to AMINA, who added her twenty, pieces. To arrange the distribution without fractions, begin with three, the denominator of the legal share: now two, its numerator, is prime to the number of sharers; and one is prime also to five, the number of residuary portions; but thirty and twenty are composed to one another, fince ten measures thirty by three and twenty by two; and five, the fum of those tenths, may be considered as standing in the place of the

number of reliduaries: again, five and three are prime to each other, and their product is fifteen. which, being multiplied into three, the firstmentioned denominator, produces forty-five, the number of equal parcels, into which HARETH's estate must be divided; so that thirty, or two thirds, may be distributed in tens to the three daughters, and fifteen or the residue, in threes to the two, who redeemed their father; ZUBAIDA taking in all nineteen, AMINA fixteen, and SA-FIYA, only ten, portions of the inheritance. This is the calculation of SHARIF, and the grounds of it will presently appear; but the operation might have been shortened thus: multiply the denominator of the legal share into the number of sharers, and then multiply the product into the denominator of the residuary portions.

The chapter of exclusion* is very perfpicuous; but the case of an unbelieving heir having really occurred in the time of Ali, we may insert it as a monument of early Arabian jurisprudence. Solma had embraced the new faith, and died, leaving her husband, and two brothers by the same mother, who were all three believers, with a son, who continued an insidel: on a dispute concerning the inheritance, Ali and Zaid

gave a moiety to the widower, confidering the fon as actually dead, a third to the half-brothers, and the rest to such of the residuaries as believed in the Korán; while IBNU'L MASUUD infifted, that the fon was dead as to the right of inheriting, but alive as to the power of excluding, and thought that he drove the widower from a moiety to a fourth part only of SOLMA's estate; but the former opinion has prevailed, and in a curious book (for which there must have been abundant materials) entitled The Diffensions of the Learned, it is admitted, that, by universal assent, if AMRU leave a father, who is either a flave or an infidel, and a paternal grandfather, who is both free and a believer, the father is confidered as dead in law to all purposes, and the grandfather is heir to AMRU.

We come now to the Arabian method of afcertaining the smallest number of parcels, into which an estate can be divided, so as to avoid fractions in the legal distribution of it: that number we call the denominator, or devisor, of the estate, though the Arabick word mean literally the place of coming out; and the problem is easily solved by the following rules: if the two numbers in question be prime, multiply one of them into the other; if they be composit to each other, multiply the measure of one into the second, and the product will be the number

fought. The whole fection * is as clear as it could be made in a verbal translation; and it would be superfluous to add examples of all the cases, which must occur to every one, who has attentively perused the preceding parts of the work.

A case, which arose in the reign of OMAR, has given occasion to some debate +: LAILA died, leaving only AMRU her husband, HINDA her mother, and ABLA her fifter of the whole blood. Now the husband and fifter were each entitled to a moiety, and the mother, to a third, of LAILA's property, which, by the rule then established, could be divided into fix parts only; but ABBAS, a companion of MUHAMMED, being confulted by the Caliph, proposed, that the regular divisor should be so increased, that of eight parts AMRU and ABLA might each take three, and HINDA two. The fon of ABBAS, whose opinions were always rather ingenious than folid, was prefent at the decision; but, fearing the bad temper of the Caliph, suppressed at that time his own fentiments: he thought, that the fifter, having (as we have feen) a weaker right, should bear the loss, because, where different rights concur, the weakest invariably yields; and he faid, that if an arithmetician

^{*} Page 226.

could number the fands, yet he could never make two halves and a third equal to a whole; but his opinion has never been adopted, because, although the fifter may in some cases be removed into a distinct class of heirs, yet, with a husband and a mother of the deceased, her share is fixed by positive law, and she cannot by any means be deprived of it; fo that the shares of all the claimants must be diminished in exact proportion; for instance, if the property had been twenty-four pieces of gold, the mother would claim eight, and each of the other heirs, twelve; now those claims cannot all be satisfied, but eight is to twelve, as fix to nine, which will be the respective shares, according to the decision of ABBAS.

Examples of the divisor fix increased to feven and to nine, or of twelve to thirteen, fifteen, and feventeen, would appear equally ingenious, but would swell this commentary to an immoderate fize: there are two decisions, however, deserving particular notice, because they were made in real causes, and have been universally approved. Zubaida left her husband Adnan, with two sisters of the whole blood, two sisters by the same mother only, and the mother herself; whose legal shares, in order as they are mentioned, were a moiety, two thirds, a third, and a sixth: it was impossible, therefore, to distribute them out of

thirty pieces, for instance, divided into fix equal parcels; but the judge, named Shurain, dis vided the whole estate into ten parcels, each confifting of three pieces, and allotted them to the claimants in the proportion of their shares; that is, to the husband, three parcels, to the fifters of the whole blood, four; to the half-fifters, two; and to the mother, one; affuring ADNAN. who at first complained of the judgement, that OMAR had made a fimilar decision; and this case acquired celebrity among the Arabs by the name of Shuraihiyya. The next case, which was answered at once by ALI, while he was haranguing the people in the mimbar, or pulpit, at CUFA, is fully stated in the text: the share of the widow was, regularly, an eighth; that of the daughters, two thirds; and that of each parent, a fixth, all which cannot be distributed out of twenty-four parcels; but All pronounced, that the property of the deceased should be divided into twenty-seven equal parts, of which the widow should have three; the daughters hxteen; and the two parents, eight. It is recorded, that, when the person, who consulted All, was much diffatisfied with his answer, and asked whether the widow was not legally entitled to an eighth, the Caliph faid rapidly, "it is become a ninth," and proceeded in his harangue with his usual eloquence.

The arithmetical part of the Sirájiyya * is very fimple, and may be found in the first pages of all our elementary books; but the difference of the Arabian idiom occasions a little obscurity. The chapter on primes and measures is founded on a fimple analysis: when two numbers are compared, they are either equal or unequal; if unequal, either the smaller is an aliquot part of the greater, or they have a common measure, which must either be unit alone, or some number, which the Arabs define a multitude composed of units. When the greatest common measure is found by the rule, they consider the two numbers as agreeing in a fraction, which has that common measure for its denominator and unit for its numerator; but the nature of the Arabick language makes it impossible to express in a fingle word the fractions less than a tenth: thus twenty-seven and twenty-four agree, as they express it, in a third; and a third of each number is called its wafk, or measure, as nine of twenty-feven, and eight of twenty-four. After this explanation of the word, which is translated the measure, there will be no difficulty in the following cases.

I. + AMRU leaves only his father and mother and ten daughters: now, by the rule, his estate

^{*} Page 228.

fhould be divided into fix parts, because the share of each parent is a fixth, and that of all the daughters two thirds; but four parts cannot be distributed, without a fraction, among ten persons; for which reason we must multiply five, which is the measure of ten, into fix, which is the first number of parcels, and the product thirty is the number of lots, into which the property of Amru must in fact be divided; each of his parents taking five lots, and each of his daughters two.

II. HINDA leaves her husband, both her parents, and fix daughters; whose legal shares are a fourth, two fixths, and two thirds, of the inheritance: now the regular denominator of the lots would be twelve, but it is raised to fifteen; and since eight parcels cannot be distributed equally among fix daughters, the measure of six, or three, is multiplied by sisteen; so that of forty-five lots nine may go to the husband, twelve to the parents, and twenty-four to the daughters, in exact proportion to their first distributive shares.

It will be very eafy to apply the remaining rules to all the other examples given by SIRA-J'UDDIN*; but fince, in the two last cases, which are not likely to occur, the inheritance

must be divided into 4320 and 5040 parcels, the calculation, after the Arabian mode, in words at length, would be infufferably tedious, and the reader may make it in figures with little or no trouble. The latter of those two cases * is, however, subjoined; because it will fully explain the section, in which no examples are given. SAAD leaves two wives, fix female ancestors, capable of inheriting together, ten daughters, and feven paternal uncles, whose shares of twenty-four (the root, as they call it, of this case) are three, four, fixteen, and one; for the uncles can only take what the others leave. Now by observing the primes and measures, and working according to the rule, we come to 210, which must be multiplied by twenty-four, and the product gives the smallest number of parcels, into which SAAD's eftate can be duly divided: the products of that multiplicand (210) by 3, 4, 16, give 630, 840, 3360, which are the allotments of the wives, female ancestors, and daughters; and the allotment of each sharer appears at once from the following proportions:

Persons.	First Shares.	MULTIPLICAND.	SHARES OF EACH.
	3 :		: 531.
	4:		: 140.
10 :	16;	: 210	: 336.

^{*} Page 232.

The last act of the Muselman judge is to make an actual division of the state*; and we will suppose that LAILA, in the case answered by by ABBAS, had left ZAINEB and ABLA, two fifters of the whole blood, with AMRU, her husband, and HINDA, her mother; and that her property amounted only to twenty-five gold mobrs: now the root of the case is increased, as we have seen, from fix to eight, which is prime to twenty-five; and the products of two, the share of each fifter, of three, the share of the husband, and of one, the share of the mother, multiplied by the number of gold mobrs, are 50, 75, and 25, which, divided by eight, give the following shares: to each fifter, 6 mohrs, 4 rupees; to AMRU, 9 m. 6 r.; to HINDA, 3 m. 2 r. Had LAILA's estate been fifty gold mobrs, the distribution would have been thus:

		M.	R.
ZAINEB,	•	12,	8.
ABLA,	•	I 2,	8.
Амки,	•	18,	12.
HINDA,	•	б,	4.

It feems needless to give examples of the simple rules for ascertaining the dividends of each class; but the passage concerning creditors,

^{*} Page 233.

at the close of the chapter, is made obscure by extreme brevity, and requires a short illustra-Suppose the affets of AMRU to be nine pieces of gold; his debts, five pieces to SAAD, and ten to AHMED; here the aggregate of the debts, fifteen, is composit to nine, and their measures are five, and three; so that, by the rule before-mentioned of distribution among beirs, AHMED will receive fix, and SAAD, three pieces; but, had the debtor left thirteen, which would have been prime to the amount of both debts, then fifteen, standing in the place of the verification, as they call it, must be the devisor of the feveral products, arifing from the multiplication of ten and five into thirteen, and the quotients 82 and 41 will be the respective dividends of AHMED and SAAD.

The practice of fubtraction* arose from the case of Abdur'rahman and his sour wives, decided in the reign of Othman; and the section concerning it will be made clear by a fuller explanation of the example in the text. We have seen, that the widower is entitled to a moiety, the mother to a third, and the uncle, to the residue; so that, if Laila's estate be divided into six parcels, the distribution may be made without a fraction: but if the widower agree to

^{*} Page 234.

keep the mahr, or nuptial present to his wife. which he had never actually paid, instead of his three fixths of the whole, the remainder, after deducting the mahr, must be divided into three parts, of which the mother will have two, and the uncle one. So, if the mother agree to take a jewel, or other specifick thing, in lieu of her two fixths; or the uncle, a flave or a carriage, in the place of his fixth part, the remainder, which would be four parts in the first case, and five in the fecond, must go to the other claimants in proportion to their shares. Again; if AMRU leave his mother FATIMA, two fifters by the fame mother, LATIFA and SOLMA, and the fon of a paternal uncle, Selim; here also the inheritance must be divided, by the rule, into fix parts: now, if the deceafed left a female flave and thirty gold mohrs, and, if SOLMA confented to keep the flave instead of her legal share, or a fixth, the remainder of the property must then be divided into five parcels, fix gold mobrs in each, of which FATIMA and LATIFA must receive each one parcel, and SELIM, the three parcels, which remain. It is obvious, that, if the first calculation were made, in the preceding cases, on a supposition, that the taker of the specifick thing was dead or incapable of inheriting, there would be either a defect or an ex-

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cess, in some of the allotments to the other claimants.

There is no difficulty in the chapter on the return*, except what arises from the Arabick idiom, to which the reader is probably by this time habituated; but it is necessary to remark, that, although, by the letter of the Korán and the strict rules of law, no return can be made to the widower or widow, yet an equitable practice has prevailed, in modern times, of returning to them on failure of sharers by blood and of distant kindred. The last case in the chapter can rarely occur; and the refult of the calculation (which fills ten pages in the Persian work of Maulavi KASIM) is, that, of 1440 parcels, the four widows take (36 × 5 =) 180; the nine daughters (36×28=) 1008; and the fix female ancestors (36×7=) 252; so that 45 parts go to each widow, 112 to each daughter, and 42 to each female ancestor.

The rights of the paternal grandfather have been more disputed than any other point of Arabian law; no fewer than feventy contradictory decisions having been made concerning them in the reign of OMAR; but the dispute is now settled among the Sunnis according to the opinion of ABU HANIFA; and the chapter on

^{*} Page 235-237.

division seems to have been inserted merely from respect to ABU YUSUF and MUHAMMED, who diffented on this point from their master *: it is one of the clearest chapters in the Sirájiyyab, and will be useful to us, if the question should arise in a family of Shiahs, who follow, no doubt, the opinions of ALI and ZAID. The case called acdariyya, which was decided by the fon of THABIT, and has acquired fuch celebrity in Irák, that it is distinguished among the lawvers of that country by the epithet of algharrà, or the luminous, is a perspicuous example of the grandfather's division in a double ratio with the fifter: the conjecture, formerly hazarded by myself, that it was named acdariyya, because the rules of inheritance are disturbed by it in favour of the grandfather, had occurred, I fee, to some Arabs, and is mentioned by SHARIF without disapprobation.

It will be necessary to illustrate by examples the chapter on fuccession to vested bereditary interests †: and, first, we may suppose, that ZAID had two wives, named ZAINEB and LATIFA, and that ZAINEB died possessed of separate property, leaving her husband, her mother Zuhra, and Hinda, her daughter by her former husband: now the legal shares, in order as the

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^{*} Page 237-240.

[†] Page 210-242.

sharers are named, would be a fourth, a fixth, and a moiety; so that regularly the estate should be divided into twelve parts, but it is here divided into four, because there must be a return to ZUHRA and HINDA, in the proportion of their shares, that is as one to three; but, when ZAID has taken his fourth, the three fourths, which remain, cannot be distributed in that proportion; and, fince three and four are prime to each other, we therefore multiply four, confidered as the number of persons entitled to a return, into four, the denominator of the hufband's share, and the fquare number answers the purpose of integral distribution; for of fixteen parcels ZAID will be entitled to four, ZUH-RA to three, and HINDA to nine.

Suppose next, that ZAID himself dies, before any distribution actually made, leaving only LATIFA before-mentioned, his mother BASIRA, and his father ABID: here four parts of the former inheritance having vested in him, the distribution is easy; one part going to LATIFA, as her fourth, one also to BASIRA, as her third of the residue, and two parts to ABID; in exact proportion to their several claims on his own estate.

Thirdly, suppose HINDA to die before any actual distribution, leaving the before-named

ZUHRA, her grandmother, ZUBAIDA daughter, and two fons, HA'TIF and BASHAR: now she had a vested interest in nine parts out of the fixteen, and, her own estate being divisible into fix parts, we observe, that nine and fix are composit to each other, or agree, as the Arabian phrase is, in a third; so that a third of six, or two, must be multiplied into fixteen, and the product thirty-two will be the denominator for both cases; for of thirty-two parts nine will vest in ZUHRA (six as mother to ZAINEB. and three as grandmother to HINDA), twelve in the two fons, three in ZUBAIDA, and eight in ZAID's representatives; fince, to ascertain the thare of each individual, the just-mentioned shares out of fixteen must be multiplied by two, and those out of fix, by three, which is here called the measure of HINDA's vested interest.

Let us fourthly suppose, that Zuhra also dies before any distribution, leaving her husband Caab, and two brothers Calib and Tarif. Now her own estate is arranged by four, the husband taking a moiety, and each of the residuaries one fourth; but four and nine are prime to each other; and four, therefore, multiplied by thirty-two, produces an bundred and twenty-eight, the denominator of both cases: we must then multiply by four the shares out of thirty-two, and by nine the shares out of four,

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and the products will be lots of the several claimants; eight parcels going to LATIFA, sixteen to ABID, eight to BASIRA, forty-eight in moieties to HATIF and BASHAR, twelve to ZUBAIDA, eighteen to CAAB, and eighteen in moieties to CALIB and TARIF.

We need only add, that, although the conclusion of the chapter before us be obscured by its extreme conciseness, yet it plainly means, that, "when any number of heirs die successively before the distribution, if the shares "vested in the last deceased do not quadrate with the arrangement of his own estate, we must consider all those, who died before him, as one deceased beir, and himself as the second, and then work by the preceding rules;" to give more examples would be very easy, but the reader would find them insupportably tedious.

All controversies on the claims of the next of kin, who are neither sharers nor residuaries, are now at an end *; for it seems to be settled, that they succeed according to the order prescribed in our text.

I. On the first class of distant kindred the doctrine of ABU YUSUF has far more simplicity

^{*} Page 242, 243.

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than that of MUHAMMED, in which there is an appearance of intricacy; but an attentive reader will find no difficulty in the case reduced to the form of a table, in which the lowest of the fix ranks are supposed to be the claimants of AMRU's estate *: he will see. that ABU YUSUF would divide that estate into fifteen parts, giving one to each of the female, and two, by the rule in the Koran, to each of the male, descendants; but that MUHAMMED would arrange it in sixty parcels, twenty-four of which would go to the representatives of the three sons, and thirty-six to those of the nine daughters; due regard being paid to the double portion of the male defcendants, fo as to bring the shares of the twelve claimants to the following order from the left hand, twelve, eight, four; nine, three, fix; fix, two, four; three, two, one. The correctness of this method has, it feems, obtained it a preference over that of ABU YUSUF, whose practice, however, is followed, on account of its facility, in Bokhára and fome other places; although of the two different traditions from ABU HANIFA, that reported by Muhammed be the more publickly known and the more generally believed.

The reader would be unnecessarily fatigued,

^{*} Page 244, 245.

if we were to exhibit every step of the arithmetical process, by which the estate of Amru must be distributed, according to the opinion of Mu-HAMMED, between his great grandson by semales only, and his two great grandsaughters, who have the advantage of a male in the line of descent *; nor does the section concerning the difference of sides require elucidation.

II. On the fecond class, or the grandfathers and grandmothers, who are excluded from shares, we need only fum up the doctrine of our author in the words of SHARIF:-" The degrees " in this case are either equal or unequal; if " unequal, the nearer is preferred; if equal, the " preference is given to the person claiming "through a sharer; if there be an equality in " that respect, the sides must be the same or dif-" ferent; if different, the distribution must be " made in thirds, the paternal fide having a " double allotment; if the same, the sexes of the " roots, or ancestors, must agree, or not; if "they agree, the estate must be distributed ac-" cording to the persons of the branches, or " claimants; if not, according to the first rank " that differs, as in the preceding class †."

III. There feems no difficulty in the chapter ‡ on the third class of distant kindred; but

^{*} Page 247, 248.

[†] Page 249.

[‡] Page 250.

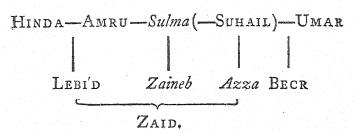
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it must be remarked, that although the brothers and sisters by the same mother only take equally, according to the Koràn, without any distinction of sex, yet that exception to the general rule by no means extends to the issue of such brothers and sisters.

IV. Although the claims of uncles and aunts, in three cases, be clearly explained in the text *, yet it may not be improper to subjoin an example from the commentary of Maulavi Kasım, which the following pedigree will make more intelligible than his dry state of the case:



AMRU, having had by HINDA a fon, named LEBID, married SULMA, by whom he had a daughter, named ZAINEB: after AMRU's death, SULMA married SUHAIL, to whom she produced AZZA, and after his death, she married UMAR, by whom she became the mother of BECR: now ZAID was the son of LEBID and AZZA; and he died, leaving no heirs but

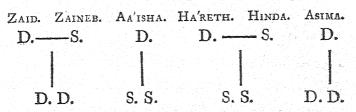
^{*} Page 253.

BECR the brother, by the fame mother, of his mother AZZA, and ZAINEB, who was his paternal aunt by the fame father AMRU, and his maternal aunt by the fame mother SULMA. In this case, the property of ZAID must be divided into nine parcels, of which the paternal aunt will have two thirds; and the remaining third will go to the maternal uncle and aunt in the ratio of two to one; so that ZAINEB, in her two characters, will be entitled to seven ninths.

There feems no necessity to expatiate on the children of uncles and aunts, or on the coufins, as we should call them, in different degrees *; because the text will be sufficiently perspicuous to those, who perfectly understand the preceding fections: but, fince a curious case is put by SHARIF, I am unwilling to suppress it; especially as it will throw light on the whole subject before us. The father of AMRU had a brother. ZAID, and two fifters, ZAINEB and AAISHA. by the same father only: his mother also had a brother, HARETH, and two fifters by the same father, named HINDA and ASIMA: first, his father and mother died; then, all his uncles and aunts, leaving the following iffue: ZAID left two daughter's daughters, who were also the daughters of ZAINEB's fons; AISHA, two fons

^{*} Page 255.

of her daughter; HARETH, two daughter's fons, who were also the sons of the son of HINDA; and ASIMA, two daughter's daughters; as in this pedigree:



AMRU himself afterwards died, with no heirs but the grandchildren of his uncles and aunts: In this case ABU YUSUF would have divided the inheritance into thirty parts; twenty for the paternal fide; that is, five for each of the fons, and as many for each of the daughters, who have a double relation; and ten for the maternal fide, or four for each of the fons, who are doubly related, and one for each of the daughters: but Mohammed, having divided Amru's estate into thirty-six allotments, would have given twenty-four to the paternal, and twelve to the maternal fide; that is, fix to each of ZAID's granddaughters, as fuch, and four to each of them, as granddaughters of ZAINEB; two to each of AAISHA's grandfons; three to each grandfon of HARETH, as fuch; and two more to each of them, as grandfons of HINDA;

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while one thirty-fixth part would have gone to each of Asima's female descendants. The reafon of these different distributions will appear from what has preceded; but the arithmetical processes would fill many pages, and would be thought, I am persuaded, unnecessarily prolix.

On the chapter concerning hermaphrodites *, I shall make no particular observation: since monstrous births are. I trust, extremely rare in all countries, and the fubject is too shocking to be discussed without actual necessity; nor will it answer, I imagine, any useful purpose to relate the old Arabian stories, and strange opinions of fome lawyers, concerning the longest possible time of gestation +; which is now limited, on the authority of AAISHA, one of MOHAMMED's wives, to two years; and, though the Muselmans have traditionary accounts of three, four, or even five children produced at one birth, yet the practice, we find, is to referve the share of one son; or that of one daughter, if, on supposition of her birth, the sum referved would be larger t. The practice of refervation for the unborn child is well explained by the case in the text, to which we may now proceed, fince the rest of the chapter needs no illustration; unless it be necessary to inform

^{*} Page 256.

[†] Page 258.

[‡] Page 259, 260.

the reader, that a widow ought by law to abstain for a certain time after her husband's death, from the careffes of any other man; and, if the freely confess that the has not abstained, it cannot be certain, that her husband was the father of a child born more than fix months after his death. Let us then suppose AMRU to die, leaving a daughter ZAINEB, his mother ASUMA, his father LEBID, and his wife HIN-DA enseint *. So that, if a male child be born, AMRU's estate ought regularly to be divided into twenty-four parts, but, on the birth of a female, into twenty-seven; because, in the first case, the shares are an eighth, for the widow. and a fixth for each of the parents; but, in the fecond, besides the shares just mentioned, the daughters would have two-thirds between them, and it would be the case of Mimberiyyat. Now three is the common measure of twenty-four and twenty-seven, and the several measures of those numbers are eight and nine, either of which, multiplied into the other whole number, gives two hundred and fixteen for the product; and that, according to what has preceded, is the number of shares into which the inheritance must be actually divided. In the first case HINDA would have twenty-feven shares; LEBID

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^{*} Page 260.

and Asuma, each thirty-six; the posthumous fon feventy-eight, and ZAINEB, his fifter, thirtynine; but, in the fecond, the widow would have twenty-four; and each of the parents, thirty-two; while the posthumous daughter and her fister would divide the remainder between them, each taking fixty-four shares. Should four posthumous sons be born, ninety-nine shares would go to the widow and both parents; while the remainder would be divided among the children by the rule before mentioned, ZAINEB receiving thirteen parts, and each of her brothers twenty-six; but, in the case of a miscarriage, the daughter would be entitled to a bundred and eight parts, or a moiety of the whole estate, and the nine parts remaining would go to LEBID as refiduary heir.

The time, at which an absent person is prefumed in law to be dead, has varied, we see, in different ages*; but the modern practice I understand to be this: if ZAID has been so long abfent, that no man can tell whether he be dead or alive, and if seventy years have elapsed from the day of his birth, he is presumed to be dead, as to his own property, from the end of that term, but, as to his hereditary claims on the property of another, from the day of his absence;

^{*} Page 262.

fo that, in the first case, no person, dying within the feventy years, could have inherited any part of bis estate; nor, in the second, could he inherit from any one, who died after the day, when he first was missed. Though the arrangement of an inheritance, on which an abfent person may have a claim, be fufficiently clear from what has just preceded, yet a feigned case in illustration of it will not, perhaps, be thought wholly superflu-If HINDA then die at Mursbedabad, leaving AMRU her husband, with two fisters of the whole blood, NA'DIRA and SACI'NA, all refiding in that city, and a whole brother ZAID, who has long been absent and unheard of, we must confider what effect his life or his death would have on the inheritance: if he be dead. AMRU must have a moiety of the estate, and the sisters two thirds between them; and, if he be living, the widower will still have a right to his half, but ZAID will take twice as much as either of the fifters. Now, on the first supposition, the affets of HINDA must be divided, as we have shown, into feven shares, of which AMRU must have three, and each of the fifters, two; but, on the fecond, into eight parts, four of which go to the husband, and two to the brother, while NADIRA and SACINA can only have one a piece; fo that the widower has an interest in fupposing ZAID alive, and the sisters, in supposing him dead: fifty-six, therefore, or the

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product of seven and eight, which are prime to one another, is the number of shares, into which the estate must be divided; twenty-four of them being delivered to AMRU, and seven to each of the females, as the least shares to which they can in either event be feverally entitled; if ZAID then return to the city, four shares more go to AMRU, and fourteen are the right of the brother; but, if his death be proved, or prefumed by lapse of time, the eighteen reserved shares must be divided equally between SACI'NA and NA'DIRA, to complete their two fevenths, which the law gives, in that case, to each of them. The Persian commentator has added three cases. in one of which the two first divisors of the asfets are composit to each other; but the operation in all of them is too easy to require an example.

In the sections concerning apostates and prifoners of war*, there seems to be no obscurity; but it is proper to add, that, as the law is now settled, the heirs of an apostate, who were in being at the time of his death, are entitled to their legal shares, whether they were born before or after his apostasy; though a husband or wife cannot succeed to an apostate, because a change of religion is an immediate dissolution of the marriage.

^{*} Page 264.

We are now come to the concluding fection, which cannot be better illustrated than by two feigned cases from the Persian and Arabian com-I. ZAID and his daughter ABLA were at sea in the same ship, together with BASHAR, his brother's fon, and his great nephew AMRU, fon of BASHAR: the ship was lost, and all, who were in it, perished; so that which of them first died, could never be clearly ascertained. Now AMRU left behind him a wife and a daughter; and ABLA had an only fon: in this case, by the opinion of ABU HANIFAH and his followers, the four drowned persons are supposed to have perished in the same instant, and their feveral estates go to their furviving heirs respectively, according to the rules. which have been already explained; but by one of two traditions from ALI, the affets of ZAID being equally divided, and ABLA being fupposed to have outlived her father, the fon takes one moiety in her right, while the other moiety is conceived at first to have vested in BASHAR. and then in Amru, between whose widow and daughter it is distributable according to law. 2. KA'SIM and his younger half-brother HASAN were drowned in the fame boat, each leaving a mother, a daughter, and a patron, by whom each of them had been manumitted: then, if each of them left ninety pieces of gold on shore, the pro-

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perty of each must be severally distributed, according to the Hansfeans; the daughter of each taking balf, or forty-five pieces; the mother a sixth, or sisteen, and the manumittor, as residuary, the thirty pieces which remain; but according to All, the younger brother Hasan being sirst considered as the survivor, that residue vests in him, and is then distributed, in the just mentioned ratio; balf of it, or sisteen, going to his daughter; a sixth, or sive pieces, to his mother; and ten, the residue, to his patron; next, Ka'sim being supposed to have survived, the same rule is applied to him; so that the daughter of each takes on the whole sixty; the mother, twenty; and the manumittor, ten pieces of gold.

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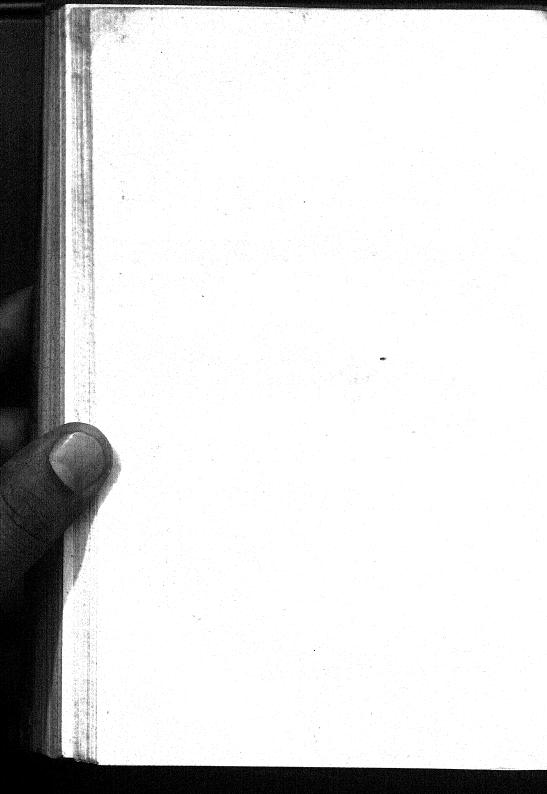
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N.B. The Arabic sheets must be placed according to the signatures (from the right hand to the left) so as to begin where an English book would end, and to end where that would begin. To follow page 323, vol. vi.

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ما توامعاً فَهَالُ كُلِّ وَاحِدٍ مِنْهُمْ لِوَرَثَتَهُ الْأَحْياءِ وَلاَ يَرِثُ مَا تُوامَعاً اللَّ مُواتِ مِنْ بَعْضٍ هٰذَا هُو الْهُخْتَارُو قَالَ عَلَيَّ بَعْضُ اللَّ مُواتِ مِنْ بَعْضٍ هٰذَا هُو الْهُخْتَارُو قَالَ عَلَيَّ وَ ابْنُ مَسَعُودٍ فَي إِحْدَى الرِّوايتَيْنِ عَنْهُمَ مِنْ صَاحِبِهِ وَ ابْنُ مِنْ بَعْضِ اللَّ فَيْمَاوَرِثَ كُلِّ وَاحِد مِنْهُمْ مِنْ صَاحِبِهِ يَرِثُ مِنْ بَعْضِ اللَّ فَيْمَاوَرِثَ كُلِّ وَاحِد مِنْهُمْ مِنْ صَاحِبِهِ تَرَتْ مِنْ بَعْضِ اللَّ فَيْمَاوَرِثَ كُلِّ وَاحِد مِنْهُمْ مِنْ صَاحِبِهِ تَرَتْ مِنْ بَعْضِ اللَّ فَيْمَاوَرِثَ كُلِّ وَاحِد مِنْهُمْ مِنْ صَاحِبِهِ تَرَتْ مِنْ بَعْضِ اللَّا فَيْمَاوَرِثَ كُلِّ وَاحِد مِنْهُمْ مِنْ صَاحِبِهِ لَيْ اللَّهِ اللَّهُ السِّرَ احِيَّةَ بِعَوْنَ اللَّهُ لَكَالَى اللَّهُ لَكَالَى

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فَهُونِي بِالإِجهَاعُوكَسُبُ الْهُرِتَدَةِ جَهِيعًا لُورَتَهَا الْهُسَلِمِينَ بِلاَّخِلاَفٍ بَيْنَ أَصْحَابِنَا رَحِهُمُ اللَّهُ وَأَمَّا الْهُرِتَدُ فَلَايِرَتُ مِنْ أَحَدِلاَمِنَ مُسْلِمٍ وَلاَمِنْ مُرْتَدِّ مِثْلَهُ وَحَذَٰلِكَ الْهُرْتَدُةُ لاَ تَرِثُ مِنْ أَحَدِلاَمِنْ أَحَدِ اللَّا إِذَا ارْتَدَ اهْلُ ناحِيةً بِاجْهِمْ فَحِينَنَذِ

بأب الأسير

إِذَا مِأْتُ جَمَّاعَةً وَلاَ يُدْرَي أَيُّهُمْ مَّاتَ أُوَّلًّا جُعِلُوا كَأَنَّهُمْ

من ماله لأن الم فقود ميت في مال غير والاصل في تُصْحير مسايل المغقودان تصحيح المسنلة على تقدير حياتة ثم تُصْحِيح الهسنلة علي تقدير و فاتم و باقي العمل مَاذَكُرْ نَانِي الْحَبْل فَصْلُ فِي الْهُرْتَة إِذَاماتَ الْهِرْتُدُ أُوتَتِلُ أُولِحِفَ بِدَارِ الْحُرْبِ وَحَكَّمُ الْعَاضِي بِلْحُوْقِهِ فَهَا أَكْنَسَبَهُ فِي حَالِ إِسْلَامِهِ فَهُولُورَ ثَنِهِ الْهِسْلِمِينَ وَمَا اكْتَسَبَهُ فِي حَالِ الرِّدَّةِ يُوْضَعُ فِي بَيْتِ الْإِلْ عِنْدَ

أَبِي حَنِيْغَةُ رَحِهُ اللَّهُ وَعِنْدَهُمَا الْكُسْبَانِ جَهِيْعًا لِوَرَثَتِه

الْهُ سُلِهِيْنَ وَعِنْدُ الشَّافِعِيِّ رَحِهُ اللَّهُ الْكُسْبَانِ يُوضَعَانِ

فِي بِيْتُ الْهَالِ وَما اكْتَسْبَهُ بَعْدَ اللَّحُوْقِ بدار الْحَرْب

Kari

PVSA

يُصِحُ مُوتِه اويهضي عَلَيْهِ الْهِ لَهُ وَإِخْتَلَغَتِ الرِّ وَايات فِي تَلَكُ الْهِدَّةِ فَغَيْ ظَاهِرِ الرِّوالَّةِ أَنَّهُ إِذَا لَمْ يَبْغَ أَحَدٌ مِنْ أَقْرَانِهِ حَكُم بِهُوتِهُورَوَي الْحَسَن بْن زِيَادٍ عَن أَبْيَ عَنْ أَنْكَ نِيعَةُ رَحِهُ اللّه أَنَّ تِلْكَ الْهِدَّةِ مِالَيَّةٌ وَعِشْرُونَ سَنَّةً مِنْ يَوْمَ وَلَدِ فَيْهِ وَقَالَ محمد ماية وعشر سِنين وقال أبويوسف ماية وخمس سِنين وَ قَالَ بَعْضُهُمْ تِسْعُونَ سَنَةً وَعَلَيهُ الْغَنُّوي وَ قَالَ بَعْضُهُمْ مال المغقود موقوف إلي اجتهاد الامام وموقوف الحكم في حَقِّ غَيْرِهِ حَتَّى يُوَتَّفْ نَصِيْبَهُ مِنْ مَالِ مُوْرِثِهِ كَمَافِي ٱلْكَهْلِ فَإِنَّا مُضَتِ ٱلْهِنَّةَ وَ حَكُم بَهُوْ تِهِ فَهَالُهُ لُورَ ثُنَّهِ الهوجودين عند الحكم بهوته وماكان موقوفًا لأجله من مَّالِ مُورِثِهِ يَرَدُّ إِلَى وَارِثِ مُورِثِهِ الَّذِي وَتِّفَ ذَٰلِكَ الْمُوتُوفِ

سُهُمَّا لَأَنَّ الْمُوْتُونَ فِي حَقَّهَا نَصِيبُ أَرْبَعَة بَنيْنَ عَنْنَ أَيْكَنِيغَةُ رِحِهُ اللَّهُ وَإِذَا كَانَ الْبَنُونَ أَرْبَعَةُ فَنَصِيبُهَا سَهُمْ وَأَرْبَعَةُ أَتْسَاعِ سَهُمِ مِنْ أَرْبَعَةُ وَعَشْرِيْنَ مَضْرُوبُ فَي تَسْعَةُ فَصَارَ ثَالَاثَةَ عَشَرَسَهُما فَهِيَ لَهِا وَالْبَاقِي مَّوْقُوفٌ وَهُومَايَةٌ وَخَهْسَةٌ عَشْرَسْهِماً فَأَنِ وَلَدُتْ بِنَتَا وَاحِدَة أُواكِثَرَ فَجَهِيع البوقوف للبنات وإن ولدت إبنا واحما أواكثر فيعطي للمراع والأبوين مَاكَانَ مَوْتُوْفًا مِنْ نَصَيْبِهِمْ وَمَابِقَيَ يُقْسَمْ بَيْنَ ٱللَّا وْلاد وَإِنْ وَلَدَتْ مَيَّتًا نَيْعُطَي للْمَرْأَة واللَّبُويْن مَّاكَّانَ مَوْقُوْفَامِنْ نَصِيْبِهُ وَللْبِنْتِ إِلَى تَهَامِ ٱلنِصْفِ فَهُوَخَهُ سَتَّوَتِ سِعُونَ سَهُمًا وَ الْبَاقِي للَّابِ وَ هُو تَسْعَةَ أَسْهِم لِأَنَّهُ عَصَبَةً بَابُ الْهَفْقُول ٱلْهَفَقُولُهُ عَيِّ فِي مَالِهُ حَتَّى لاَيْرِثُ مِنْهُ أَحَدُّ وَيُوتَّعْ مَالْهُ حَتَّى

Kar

PVSM Ujit S

Sinh

وَاحِدٍ مِنَ الْوَرْتُةِ مَاكًانَ مَوْتُوفًا مِنْ نَصِيْبِهِ كَما إِذَا تُركَبِنْتًا وَ أَبُويِن وَ امْراأَةً حَامِلَةً فَالْهُسْبِكَةُ مِنْ أَرْبَعَة وَعَشْرِيْنَ عَلَيَ تَغْدِيرِأْنَ الْحَهْلُ ذَكْرُومِن سَبْعَةً وَعِشْرِينَ عَلَي تَعْدِيرَانَهُ انثي وبين عددي تصحيح المسلتين توانف بالثلث فَإِذَا فَرَبُ وَفَعَ الْحَدِهِ إِنْ فِي جَهِيعِ الْأَخْرِصَارَ الْحَاصِلُ مَأْتَيْنِ وَسِنَّةَ عَشْرِسُهُمَّا وَمُنَّهَا تُصِحُّ الْهُسَنَّلَةُ وَعَلَيَ تَعْدِيرِ ذَكُورَتِهِ للْهَرْأَة سَبْعَةً وَعَشْرُونَ وَلَكُلِّ وَاحْدِ مِنَ الْأَبُويْنِ سَتَّةً وَثَلَاثُونَ وَعَلَي تَغْدِيْرِ الْأَنُوثَةِ لِلْمُرْأَةِ أَرْبَعَةٌ وَعِشْرُونَ وَلِكُلِّ وَاحِدُ مِنَ الْأَبُويِنِ إِثْنَانِ وَ ثَلَاثُونَ نَيْعَطِّي لِلْهُرَأَةَ أَرْبَعَةٌ وَعَشُرُونَ وَيُوتَعُ مِنْ نَصِيبُما تَلَاثَةُ أَسْمٍ وَيُوتَعُ مِنْ نَصِيبٍ كُلِّ وَاحِدِمِنَ الْأَبُونِي أَرْبَعَةُ أَسْمٍ وَيَعْطَى لِلْبِنْتِ ثَلَاتَةَعَشَر

الْحَهْلُ ذَكْرُوعَلِي تَعْدِيرِ الْمَانِثِي ثَمْ تَنظرِبِينَ تَصْحِيْحِ الْهَسْنَكَتَيْنَ فَانْ تَوَانَقَا فَاضْرِبْ وَنْقَ إِحْدَيْهَا فِي جَمِيْعِ الْأَخْرَي وَإِنْ تَبَايَنَا فَاضْرِبُ كُلَّ إِحُدْيهُ ۚ إِنْ جَهِيْعِ الْأَخْرَي فَالْحَاصِلُ تُصْحِيْمِ الْمِسْلَةِ ثُمْ اضِرِ بِنِصِيبَ مَن كَان لَه شيي مَنْ مَسْنَلَةُ لَهُ وَرَتِهُ فِي مَسْنَلَةِ انُوثَتِهِ أُوفِي وَفِعْهَاتُمْ مَنْ كَانَ لَهُ شَيْئٌ مِنْ مَسْنَلَةُ أَنْوَتته في مَسْنَلَة نَكُورتِهِ أَوْ فِي وَنْعَهَا كَهَانُكُونَانِي الْخَنْتُي ثُمَّ انظرِنِي الْحَاصِلَيْنِ مِنْ الضَّرْبِ أَيَّهُما أَقَلَّ يَعْطَي لِذَلِكَ الْوَارِثِ وَالْغَضْلُ بَيْنَهُمَا مَوْقُوفٌ مِنْ نَصِيْبِ ذَٰلِكَ الْوَارِثِ فَاءِذَا ظَهِرَ الْحَهْلُ فَإِن كَانَ مُسْتَحِقًا لَجَرِيعِ الْهُوتُوفِ فَبِهَا وَ إِنْكَانَ مُسْتَحِقًا لِلْبَعْضِ فَيَلْحُدُ ذَٰ لِكَ الْبَعْضَ وَالْبَاتِيْ مَعْسُوْمٌ بِيْنَ الْوَرَثَةِ فَيُعْطَي لِكُلِّ

AFF

Karii

PVSM

VSM /

Sinh:

ولَمْ تَكُنِ الْهِرَأَةِ أَتَرَّتُ بِانْقِضَاءِ العِدَّةِ بِرِثُ وَيُورِثُ عَنْهُ وَإِنْ جَاءَ تُبِالُولَدِ لِأَكْثَرُمِنَ أَكْثَرِ مِدَّةِ الْحَهْلِ لاّيرِثُ ولا يُورِثُ عَنْهُ وَإِنْ كَانَ ٱلْحَهْلُ مِنْ غَيْرِهُ وَجَاءَ تَابِالُولَدِ لِسِتَّةِ أَشْهِرٍ أَوْ أُقَلَّ يَرِثُ وَ إِنْ جَاءَتُ بِالْوَلَدِ لِأَكْتَرَ مِنْ أَقَلِّ مُدَّةِ الْحَهْلِ لاَيرِثُوطِرِيْقُ مَعْرِفَة حَيْوةِ الْحَهْلِ وَقْتُ الْوَلاَهِ أَنْ يُوجَدَ منه مايعلم به الحيوة كصوت أو عطاس أوبكاء أو ضحك أو تَحْرِيكِ عَضْوِفَانٍ خَرَجَ أَقَلَّ الْوَلْدِ ثُمَّ مِاتَ لا يَرِثُوان خَرَجَ ا مرد دي مات يرث فإن خرج الولد مستقيها فالمعتبر صدره اعني إذاخرج صدره كله يرث وإن خرج متكوسا فالمعتبر سرته الاصل في تصحيح مسايل الحمل ان تُصَحِّمَ الْهُسْنَلَةُ عَلَي تَعْدِيرِينِ اعْنِي عَلَي تعْدِيرِان سِنيْنَ وَعِنْدَ الشَّافِعِيِّ رَحِهُ اللَّهُ أَرْبُعُ سِنيْنَ وَعِنْدَ الزَّهْرِيِّ رَحِهُ الله سَبْعُ سِنِينَ وَ اقَلْهَاسِتَهُ اللهِ مِرْ يُوقِف لِلْحَهِن عِنْدَأَبِي حَنيْغَةُ رِحَهُ اللَّهُ نَصِيبُ أَزْبَعَة بَنِيْنَ أُوْنَصِيبُ أَرْبِعِ بَنَاتٍ أَيُّهُمَا أَكْثَرُ وَيُعْطَي لِبُعِيَّةِ الْوَرَثَةِ اَقَلَّ الْأَنْصِبَاء وَعِنْدُ مُحَمَّدٍ رَحِهُ اللّه يوقَف نَصِيب تَلاَثَة بنِينَ أَوْ ثَلَاثِ بنَاتٍ أَيُّهُما أَكْثُر وَالْمُعْنَهُ لَيْتُ ابْنِ سَعْدٍ رَضِيَ اللَّهُ عَنْهُ وَفِي وَايَةٍ ٱخْرَي نُصِيْبُ اَبْنَيْنِ وَإِحْدَى الرِّوَايَتَيْنِ عَنْ أَبِي يُوسُفَ رَحِهُ الله رواه عنه هِ شَام و روي الخصاف عن ابِي يوسف رَحِهُ اللَّهُ أَنَّهُ يُوقَّفُ نَصِيْبُ ابْنِ وَاحِدٍ أُوبِنْتٍ وَاحِدَةٍ وَعَلَيْهِ الْعَتُوي ويوخذ الْكِعِيلُ عَلَى تَوْلِمُوانِي كَانَ الْحَهْلُ مِنْ الهيِّتِ وَجَاتَ بِالْوَلْدِ لِنَهَامِ أَكْتَرَ مِنَّةَ الْحَمْلِ أُو أَقَلَّ مِنْهَا

L PVSM

Baljit S VSM (1

مَحَمَّدُرِجِهِ اللَّهُ يَاحَذُ الْحَنْثَي خَهْسِي الْهَالِ إِن كَأَنَّ فَكَرًا وَرُبْعَ الْهَالِ إِنْ كَانَ أَنْتَى نَيَأَ خُذَ نِصْفَ النَّصِيبَيْنِ وَفُلِكَ خَهْسٌ وَ ثُهِنْ بِاعْتِبَارِ الْحَالَيْنِ وَ تَصِّحُ مِنْ اَرْبَعِيْنَ وَهُو الْهُجْتَهُ عِنْ ضَرْبِ أَحَدِ الْهُسْلَتَيْنِ وَ اهِيَ الْأَرْ بَعَةُ فِي اللَّخْرِي وَهِيَ الْخَهْسَة ثُمَّ الْهِبْلُغُ فِي الْحَالْتَيْنِ فَهِن كَانَ لَهُ شَيْعٍ مِنَ الْخَهْ سَةِ فَهُ ضُرُوبٌ فِي الْأَرْبَعَةِ وَمَنْ كَانَ لَهُ شَيِي مِن الأربعة فَهُضروب فِي الْخَهْسَة فَصَارَ للْخَنْثِي ثَلَاثَةَ عَشَرَ وَ لِلْإِبِنِ ثُهَانِيَةً عَشَرَ وَ لِلْبِنْتِ تَسْعَةُ أَسْمٍ بَابٌ نِي الْحَمْل

اَكْتُرُمِدَةِ الْكَمْلِ سَنتَانِ عِنْدَ ابِي حَنيْقَةَ رَحِهِ اللَّهُ اللَّهُ وَاللَّهُ ثَلَاثُ وَالْمَعْدِ الْغَهْمِيّ رَحِمَهُ اللَّهُ ثَلَاثُ وَأَضْحَابِهِ وَعِنْدَلَيْثِ بْنِ سَعْدِ الْغَهْمِيّ رَحِمَهُ اللَّهُ ثَلَاثُ

رِّضِيَ اللَّهُ عَنْهُ وَعَلَيْهِ الْغَنُّوَي كَهَا إِذَا تَرَكَ إِبِنَا وَبِنْتًا وَخَنْتًى فَللْخِنْتَي نَصِيب بِنْتٍ لَاِنَّهُ مِتَيَعَّنَ وَعِنْدَ عَامِرِ الشَّعْبِي وهو قول أبن عبَّاسٍ رَضِيَ الله عنهمَا لِلْخَنْثَي نَصِف النَّصِيبَيْنِ بِالْهِنَا زَعَةِواَخْتَلَغَافِي تَخْرِيجِ قَوْلِ الشَّعْبِي قَالَ ابويوسفَ لِلْإِنِ سَهُمْ وَلِلْبِنْتِ نَصِفَ سَهْمٍ وَللْخَنتَي ثَلَاثَةُ اربّاعِ سَهْمٍ لَّنَّ الْخَنْتُي يَسْتَحِفْ سَهًّا إِنْ كَانَ ذَكَّراوَ نِصِفُ إِنْ كَانَ أَنْتُي وَهٰذَامِتَيَقَّنَ فِي أَخْذِ نِصِفِ مَجْهُوعِ النَّصِيْبَيْنِ أَوْ نَعُوْلُ يَأْخُدُ الِّنِصْفَ الْإِتَّيَعَّنِ مَعَ نَصْفِ النَّصَفِ الْهُتَنَازَعِ فِيهِ فَصَارَ لَهُ ثَلَاثَةُ ٱرْباعِ سَهْمٍ لَّأَنَّهُ يعَثْبَرُ السّهم والعول وتصّح من تسعة اونعول للأبن سهان وللبنت سُهُمْ وَلَلْخَنْتُي نَصِفُ النَّصِيْبِينِ وَهُوسُهُمْ وَنَصِفُ سَمِمْ وَقَالَ

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لأَب لٰكِنَ الثَّلْثَيْن لِهَنْ يَدُّلِي بِعُرَّابِةُ الْأَبِ فَيُعْتَبَرُونِيهِمْ قُوَّةً الْقَرَابَة ثُمَّ وَلَكُ الْعَصَبَة وَالتَّلْثُ لِهَىٰ يَدُلِي بِغَرَابِةَ الْأُمِّوْيِعْتَبُرُ فَيْهِمْ قُوَّةً الْقُرَابِةَ ثُمَّ عِنْدَ أَبِي يُوسُفَ رَحِهُ اللَّهُ مَااَصَابَ كُلَّ فَرِيتُ يُغْسَمُ عَلَي أَبْدَانِ فُرُوْعِهِمْ مَعَاعْتِبَارِ عَدَهِ الْجِهَاتِ فِي الْفَرُوعِ وَعِنْدُ مُحَمَّدٍ رَحِهُ الله يَعْسَمِ الْهَالِ عَلَى أُوَّلِ بَطْنِ اخْتَلَفَ مَعَ اعْتِبَا رِعَدَدِ الْغُرُوعِ وَالْجِهَّاتِ فِي الْأُصُولِ كَمَانِي الصِّنْفِ اللَّوَّلِ ثُمِّينَتُعَلِّلْهُذَا لَحَكُمُ الْيَ جَهِ هُوْمَة أَبُوَيْهُ وَخُووْلَتهما أَثَّم إلي أَوْلَادهم تُمَّ إلي جَهَة عَم وَمُدّ أَبُوَيْ أَبُويِهُ وَخُووْلِتِهِمَا ثُمَّ إِلَيَ أَوْلاَ دِهِمْ كَمَانِي الْعَصّباتِ

للْخَنْثَى الْإِشْكِلِ اتَلْ النَّصِيْبَيْنِ أَعْنِي أُسُوء الْحَالَتَيْنِ عِنْدَ أَبِي حَنِيفَةَ رَحِهِ اللَّهُ وأَصْحَابِهِ وَهُوتُولَ عَامَّةِ الصَّحَابِة

الْعَمِّ وَابْنِ الْعَهَّةِ كَالْهُمَا لَأَبِ وَأُمِّ ٱوْلِابُ المِالَ كُلَّةَ لبننت الْعَمِّ وَإِنْ كَانَ أَحَدُ هُهَا لِأَبِ وَأُمِّ وَالْأَخْرِلَابِ كَانَ الْهَالُ كُلَّهُ لِبَنْ كَانَتْ لَهُ تُوَّةً الْقَرَابَةِ فِيْ ظَاهِرِ الرِّواَيِةَ قِيَاسًا عَلَي خَالَةٍ لِأَبٍ مَعَ كَوْنَهَا وَلَدُذِي الرَّحِمِ تَكُونُ هِيَ أَوْلِي لِعُوَّةَ الْقَرَابِةَ مِنَ الْخَالَةِ لِأَمْ مَعَ كُونِهِ اولَد الْوَارِثِ لِأَنَّ التَّرْجِيمِ إِ بِهِ عَنَّى فِيهُ وَهُو قُوةَ الْعَرَ ابَدِّ الْوَلْيَ مِنَ الَّتَرَجِيعِ فِي غَيْرِهُ وَهُو الْإِذْلَا ءِبُالْوَارِثِ وَقَالَ بَعْضُهُمْ الْبَالُ كُلَّهُ لِبِنْتُ الْعَمِّ لِلَّهِ لَأَنَّهَا وَلَدُالْعَصَبَةُ وَإِنِ اسْتَوَوْانِي الْقُرْبِ وَلِكُنِ اخْتَلَفَ حَيِّزْ قَرَابَتِهِمْ لَااعْتَبَارَهُنَا لِتُوَّة الْقَرَابَةَ وَلَالُولَا الْعَصَبَةِ فِي ظَاهِرِ الرَّوَايَةِ قِيَاسًاعَلَى عَهَ قِلَّا وَأَمْ مَعَ كُونِهِ اَذَاتَ الْقَرَابِتَيْنِ وَوَلَدَ الْوَارِثِ مِنَ الْجِهَنينِ وَأُمَّهَا ذَاتَ فَرْضٍ لَيْسَتْ هِيَ بِأُولِي مِنَ الْخَالَةِ

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لَّا وَأَمْ أُولَا اللَّهِ اللَّهِ فَإِنْ كَانَ حَيْزِ قُرَّابِتِهِمْ لَهُ خَتَلِغًا قَلاًّ اعْتَبَا رَلَقُوَّة الغُرَابَةَ كَعَمَ قَلْبٍ وَأَمْ وَخَالَة لَّابٍ وَأَمْ وَعَهَّةِ لَأَمْ فَالثَّلْثَانِ لِغَرَابِةَ الْأَبِ وَهُو نَصِيْبٌ اللَّهِ وَالثَّلْثُ لِعَرَابَةِ الْأَمِّ وَهُوَنَصِيْبُ الْأُمْتُمَ مَااصَابَ كُلَّ فَرِيْقٍ يُعْسَمُ بَيْنَهُمْ كَهَالُواتَّكَ حَيِّزُقَرَابَتِهِم

فَصْلٌ فِي أُولادِهِمْ وَأَخْكَامِمِمْ

اَلْحَكُمْ فَيُهِمْ كَالْحُكُمِ فِي الصِّنْفِ الْأُولِ أَعْنِي أُولاهم بِالْإِيْرَاثِ أَقْرَبُهُ الِّي الْهِيِّتِ مِنْ أَيِّ جِهَةٍ كَانَ وَإِنِ اسْتَوْوْا في الغرب وَكَانَ حَيِّزْقَرَابِتَهِمْ مُتَّحِمًانَهُنْ كَانَ لَهُ قُوَّةً الْغَرَابَةِ فَهُ وَأَوْلِيَ بِالْإِجْهَاعِ وَإِنِ السَّتَوَوِّفِي الْقُرْبِ وَالْغَرَابِقُوكَانَ حَبْزِقَرَابَتِهِمْ مُنَّحِمً افْوَلُد الْعَصَبَةِ أُولِيَ مِهَنَ لَاَيْكُون كَبِنْت بُنْت ابن اخلابوام بنتابن اخلاب بنتابن اخلام اَلْهَالُ كُلَّهُ لِبِنْتِ ابنِ الْأَخِلِّبِ وَأَمِّبِالْاَتِّغَاقِ لِأَنَّهَا وَلَدُ الْعَصَبَةِ وَلَهَا أَيْضًا تُوَّةً الْغَرَابَةِ

نَصْلُ في الصّنْف الّربع

الْحَكْم فَيْهِمْ أَنَّهُ إِذَا انْغَرَّدُ وَاحْدُمُنَّهُمْ إِسْتَحَقَّ الْهَالَ كُلَّهُ لِعُدَ مِالْهُزَاحِمِ وَإِذَا اجْتَبَعُواوكَانَ حَيْزُ قَرَا بِتَهِم مُتَّحِمًا كَالْعَهَاتِ وَالْاعَهَامِ لِلْمِأْوِ الْاَخْوَالِ وَالْخَالَاتِ فَالْاَقُوي مِنْهِ أَوْلَي بِالْإِجْهَاعِ أَعْنِي مَنْ كَانَ لِأَبِ وَأَمِّ أُوْلِي مِهَنْ كَانَ لَأَبِ وَمَنْ كَانَ لَّابِ أُولِيَ مِهَنْ كَانَ لَلْمِّ ذَكُورًا كَانُواأُوانَاتًا وَإِنْ كَانُوانْ كُورًا وَانَّانَا وَاسْتُوتْ قَرَابَتْهُمْ فَلِلَّاكِرِ مِثْلً

حَظَّالْأَنْتُيينِ كَعَمِّ وَعَهِيًّ كِلَّا هُهَالِّمٌ أَوْخَالٍ وَخَالةً كِلَّاهُهَا

اخلابوام اخلاب اخلام اختلابوام اختلاب اختلام بنت بنت بنت ابن بنت ابن بنت ابن بنت عِنْدَابِي يُوسِفَ يَعْسَم كُلَّ الْهَالِ بَيْنَ فُرُوع بِنِّي الْأَعْيَانِ ثُمَّ بَيْنَ نُوْوعِ بِنِي العُلَاّتِ ثُمَّ بَيْنَ فُرُوعِ بِنَيِ الْأَخْياَفِ لِلذَّكِر مِثْلُ حَظًّا لَانْتُينِ ٱرْبَاعاً بِاعْتِباً رِالْأَبْدَانِ وَعِنْدَ مُحَمَّدٍ رَحِمُهُ اللَّهُ يَعْسَمُ تُلْثُ الْهَالِ بَيْنَ فُرُوعِ بَنعِي لَأَخْيَافِ عَلَي التَّسُويَة أَثْلَا ثَا بِاعْتَبَارِ اسْتِواءِ أُصُولِهِمْ فِي قِسْهَةِ الْأَبِاءِ وَالْنَاقِي بِينَ فْرُوْعِ بَنْيِ الْأَعْيَانِ أَنْصَافًا بِاعْتِبَارِعَكَ دِ الْغُرُوْعِ فِي الْأُصْوُلِ نَصْغَهُ لِبِنْتُ الْأَخِ نَصِيْبُ أَبِيْهِا وَالنَّصْفُ الْأَخَرَبَيْنَ وَلَذَّي ٱلْأَخْتِ لِلذَّكِرِمِثْلُ حَظِّ الْأَنْتَييْنِ بِاعْتباً رِالْأَبْدَانِ وَتَصِّح مِنْ تِسْعَةٍ وَ لَوْ تَرَكَ ثَلَا ثُ بِنَا تِ بِنَي إِنْثُو قِمْتَغَرِّ قِيْنَ بهذهالصورة

باعْتَبارِلْأَصُوْلِ وَإِنِ اسْتَووانِي الْقُرْبِ وَلَيْسَ فِيْهِمْ وَلَدْعَصَبةً أوكانَ كُلُّهُمْ أُولانُ الْعُصَبَاتِ أَوْكَانَ بَعْضُهُمْ أُولَانُ الْعُصَبَاتِ وبعضهم أولاد أشحابِ الفرابضِ واختلفت قرابتهم ٱلْهَالَ عَلَى الْإِخْوَة وَالْأَخُواتِ نِصْغَيْنِ مَعَ اعْتَبَارِعَدُ وَالْغُرُوعِ والْجِهَاتِ فِي الْأُصُولِ فَهَااصَابَ كُلَّ فِرِيقٍ يَقْسَمُ بِينَ فَرُوعِهِمْ كَمَانِي الصِّنْفِ ٱلأَوَّلِ كَبِّنتُ بِنْتِ الْأَخْتِ لِآبٍ وَأَمِّ إَوْلِيَ مِنْ ابنَ بننت اللَّخ لَابِ عِنْدَ أَبِي يُوسُفَ رَجِهِ اللَّهُ لِقُوَّةِ الْقَر ابَةِ وعِنْ مَحَمَّدٍ رَحِهِ اللَّهِ يَقْسَمُ الْهَالُ بِينَهِما نَصْغَينَ بِاعْتِبَارِ الْأُصُولُ كَمَا إَذَاتَرَكَ ثَلَاثَ بَنَاتِ إِذْوَةٍ مُتَاغَرِ قَيْنَ وَثَلَاثَ بَنيْنَ وَثَلَاثَ بَنَاتِ أَخُواتِ مُتَغَرِّرَ قَاتِ بِهِذِ الصَّوْرِةَ

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الْاُولِّ وإِنِّ اخْتَلَغَتْ قَرَابَتُهُمْ فَالثِّلْثَانِ لِعَرَابُةِ الْأَبِوَهُونَصِيبِ
الْاُولِّ وإِنِّ اخْتَلَتْ لِعَرَابِةَ الْأُمْ وَهُو نَصِيبُ الْأُمِّ مَا أَصَابَ حَلَّ الْأَبِ وَالثِّلْبُ وَهُو نَصِيبُ الْأُمِّ مَا أَصَابَ حَلَّ الْأَبِي وَالثِّلْبُ وَالْقِلْمِ الْأَمِ اللَّمِ ثُمَّ مَا أَصَابَ حَلَّ الْأَبِ وَالثَّلْبُ وَهُو نَصِيبُ الْأُمِ ثُمَّ مَا أَصَابَ حَلَّ الْأَبِي وَالثَّلْبُ وَالْقَالِمُ اللَّهِ اللَّهِ اللَّهِ الْمُعَلِينِ اللَّهِ اللَّهُ الللَّهُ اللَّهُ الْمُؤْمِنِ الْعُلْمُ اللَّهُ الْ

فَصْلٌ فِي الصِّنْفِ الثَّالثِ

لَّإِ الْهَالُ كُلَّهُ لِبِنْتِ ابْنِ اللَّحِ لِلَّآمَ وَلَدُ الْعَصَبَةِ وَلُوْكَانً

لِّهُ بَيْنُهُ اللِهُ كَرِمِثِلْ حَظِّالْأَنْثِينِ عِنْدَابِي يُوسِفَ رَحِهُ

الله أثلاً ثا باعتبار إلا بدان وعند محمور مه الله انصافا

فَصْلٌ فِي الصِّنْفِ الثَّانِي

أُوْ لَاهُمْ بِالْمِيْرَاثِ أَقْرَبِهُمْ إِلَى الْمِيْتِ مِنْ أَيِّ جَهَةٍ كَا نَ وَعِنْدَ الْإِسْتِوا ﴿ فِي دَرَجَاتِ الْغُرْبِ فَهَنْ كَانَ يَدُ لِي إِلَي الْهِيِّتِ بِوَارِثٍ فَهُوَ أَوْ لَي عِنْكَ أَبِيْ سُهَيْلٍ الْفَرَ أَبْضِي وَ ابِي فَضَيْلٍ الْخَصَّافِ وَعَلَيّ ابْنِ عِيسَي الْبَدْرِي وَلْاَتْمْضِيلُ رد مرة و دره رود و مرابي على البيه تُريِّ البستي ا وَإِنِ اسْتَوَتْ مَنَا زِلْهُمْ وَكُيْسَ فِيْهِمْ مَنْ يَدْلِي بِوَارِثٍ أَوْ كَانَ على بدارن بوارث فإن اتَّفقت صِعْقَمَى يَدُلُون واتَّحَدُت قَرَابَتْهُمْ فَالْقِسْهَ مُعَلِي ٱبْدَانهِمْ وَإِنِ اخْتَلَفَتْ صِفَةً مَنْ يَدْلُونَ بِهِمْ يَغْسَمُ الْهَالُ عَلَي أُوَّلِ بِطَنِّ اخْتَلَفَ كُهَا فِي الصِّنْفِ

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مُحَمَّدٌ رَحِمَهُ اللَّهُ يَعْتَبُرُ الْجِهَاتَ فِي الْأُصُولِ كُمَّا إِنَّا تَرَكَ

بِنْتَيْ بِنِثِ بِنِثَ مِنِثٍ وَهُمَا أَيْضًا بِنْتَا ابْنِ بِنْتٍ وَابْنُ بِنْتُ بِنْتُ إِنْتُ

بهذه الصُّورَة

بِنْتُ بِنْت بِنْتُ بِنْتُ الْبُنَّ بِنْتُ الْبُنَّ بِنْتُ الْبُنَّ بِنِنْتُ الْبُنَّ بِنِيْتُ الْبُنَّ بِنِيْتُ الْبُنَّ

عِنْدَأَبِي يُوسْفَ الْهَالْ بَينَهُ أَثَالَاتًا وَصَارَ الْهِيْتُ كَأَنَّهُ تُركَ

اَرْبَعَ بِنَاتٍ وَابْنًا فيكُون ثَلْثَاه لِلْبِنْتَيْنِ وَثَلْتُه لِلْإِبْنِ وَعَنْد

مُحَيِّدٍ رَحِهُ الله الْهَ الْهُ الْهَ الْهُ الْهَ الْهُ الْهُ الْهُ الْهُ الْهُ الْهُ الْهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ الْهُ اللَّهُ اللَّالَالِ اللَّالَالِ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُل

لِلْبِنْتَيْنِ اثْنَانِ وَعِشْرُونَ سَهُما سِتَّةَ عَشَرَ مِنْ قَبِلِ أَبِيهِما

وَسِنَّةَ أَسْمٍ مِنْ قَبَلِ أُمِّهِما وَلِا بْنِ سِنَّةَ أَسْمٍ مِنْ قَبَلِ أُمِّهِ

ابْنِ الْبِنْتِ إِنْهِيَ نَصِيْبُ جَدِّهِمَا وَتُلَائَةًا شَبَاعِهِ وَهُوَ نَصِيْبُ الْبِنْتَيْنِ يُقْسَمُ عَلَى وَ لَدَيْهِمَا أَعَنْيِ فِي الْبَطْنِ الثَّالِثِ انْضَافاً نِصْغَةُ لبِنِثِ ابْنِ بِنْتِ البِنْثِ نَصِيبُ أَبِيْهَا وَ النَّصْفُ الْأَخَرِلِا بنْتَي بِنْتِ بنتِ الْبنِتِ نَصِيْبُ أُمِّهِما و تصح من ثهانية وعشرين و قول محمد رحمه الله اشهر الرَّوايَتِينَ عَنْ الْبَحَنِيفَةَ رَحِهُ اللَّهُ فِي جَهِيعِ احْكَامِ ذَوِي الْأَرْحَامِ وَهُوَ قَوْلَ آبِيْ يُوسِّفَ الْأَوَّلُ ثُمَّ رَجَعَ فَقَالَ لَاعِبْرَةَ لِلْأَصُولِ أَلْبَتَّةَ

فَصْلَ

عَلَمَا وَنَا رَحِمَهُمُ اللَّهُ يَعْتَبُرُونَ الْجِمَاتَ فِي التَّوْرِيْثِ غَيْرَانَ الْمُروعِ وَ اللهُ يَعْتَبُرُ الْجِمَاتَ فِي الْبَدَانِ الْفُرُوعِ وَ اللهُ يَعْتَبُرُ الْجِمَاتَ فِي الْبَدَانِ الْفُرُوعِ وَ

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بنت	ثن	بنت
ٳٛڹٛؽٙ	بنْتُ	بِنْتَ
بِنْتُ	ٳڹٛؿٙ	بنْتَ
بِنْتَيْنِ	بنت	اِبْنَيْنِ
بينَ الْغُرُوعِ ٱسْبَاعًا	هُ اللَّهُ يَعْسُمُ الْهَارُ	عِنْدَأَبِي يُوسَّفَ رَحِ
ودور و مرو كلي لله يقسم الهال علي	ر «حهد رحه ا	بِاعْتِبَارِ اَبْدانِهِمْ وَعِنْ
لَّهُ السِّاعُا بِاعْتَبَارِ	ي في البطنِ ال	أُعْلَي الْخِلَافِ أَعْذِ
ةُأَسْبَاعِهِ لِبِنْتَيْ بِنْتِ	صُوْلِ فَعَنْدُهُ أَرْبَعَ	عَدَدِالْغُرُوعِ فِي اللَّهِ

وَ كَذَٰلِكَ عِنْدُ مُحَمَّدٍ رَحِهُ اللّه إِذَاكَانَ اوْلاَه الْبَنَاتِ مُخْتَلَغَة يَعْسَمُ الْهَالُ عَلَى أُولِ بَطْنِ اخْتَلَغَ فِي الْأُصُولِ مُخْتَلَغَة يَعْسَمُ الْهَالُ عَلَى أُولِ بَطْنِ اخْتَلَغَ فِي الْأَصُولِ تَمْ يَجْعَلُ اللّه رُورِطايَغِة وَالْأَناتُ طأيغٍة اخْرَى بَعْدَ الْقِسَمَة فَهَاأَصَابَ الذَّكُورِطِيقِة وَالْأَناتُ طأيعَا عَلَى الْخَلَفِ اللّه اللّه وَقَعَ فِي أَوْلا دِهِمْ وَكَذَلِكَ مَا أَصَابَ الْأَناتُ وَهَكَذَا أَيُعْهَلُ وَقَعَ فِي أَوْلا دِهِمْ وَكَذَلِكَ مَا أَصَابَ الْأَناتُ وَهَكَذَا أَيُعْهَلُ الْمَورِة وَكَذَلِكَ مَا أَصَابَ الْأَناتُ وَهَكَذَا أَيُعْهَلُ الْمَورِة وَكَذَلِكَ مَا أَصَابَ الْأَناتُ وَهَكَذَا أَيْعَهُلُ

ابن ا	انن ً	ابن ۽	بنت	بنت	بنت	بنت	بنت	بنت	بنت	بنث	ابنت
بنت	بنت	ربتي	بنت	بنت	بنت	بنت	بنت	بنت	بنث	بنت	بنت
ابن ا	بنت	بنت	ابن	ابئ	ابن ۽	بنت	بنت	بنت	بنث	بنت	بنت
بنت	بنت	بنت	ابن ء	بنت	بنت	ابن	ابن ء	ابن و	بنت	بنت	بنث
بنت	ٳڹؿ	بنت	بنت	بنث	بنت	ابن و	بنت	بنت	ٳڹڹ	بنت	بنت
بنت	بِنْتُ	بِنْتُ	بنت	بنت	ابن ا	بنت	بنت	ان ۽	بنت	ابن ء	بنْتُ

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يَغْتَبِر أَبْدَانَ الْغُرُوْعِ إِنِ اتَّغَقَتْ صِغَةُ الْأُصُولِ مُوانِعًا لَهَهُا وَيَعْتَبِرُ أَبْدَانَ الْأَصْوْلِ إِنِ اخْتَلَغَتْ صِغَاتَهُمْ وَيُعْطِي الْغُرُوعَ مِيْرَاثَ الْأُصُولِ مُخَالِغًا لَهُاكَهَا إِذَا تَرَكَ ابْنَ بِنْتِ وَبِنْتَ بِنْتِ عِنْدُهُمَا الْهَالُ بَيْنَهُمَا للَّذَكِرِ مِثْلُ خَظِّ الْأَنْثَيَيْنِ بِاعْتَبُّارِ الأَبْدَانِ وَعِنْدُ مُحَيَّدٍ رَحِهُ اللَّهُ كَذَٰلِكَ لَأِنَّ صِغَدَالْأُصُولِ مِثَّغَقَةً وَلُوتَرَكَ بِنْتَ أَبِي بِنْتٍ وَأَبْنَ بِنْتٍ بِنْتٍ عِنْدَهِمَ الْهَالَ بَيْنَ الْغُرُوْعِ اِثْلَاثًا بِاعْتَبَارِ الْأَبْدَانِ ثُلْثًا وِالْكَانِ الْأَبْدَانِ ثُلْثًا وَلَلْأَكْر وَ ثَلْتُهُ لِلْاَنْثَى وَعَنِدَ مُحَمَّدٍ رَحَبِةُ اللَّهِ عَلَيْهِ الْهَالُ بَيْنَ ٱلْأُصُولِ أَعْنِي فِي الْبَطْنِ الثَّانِيُ اثْلَاثًا ثَلْثَاءٌ لِبِنْتِ ابْنِ الْبِنْتِ نَصِيْبُ أَبِيْهًا وَثُلْثُهُ لَا بْنِ بِنْتِ الْبِنْتِ نَصِيْبُ أُمِّهِ

فَرْعِه وَ فَرْعِهِ أَوْلِيَ مِنْ أَصْلِهِ)

فَصْلُ فِي الصِّنْفِ الْأَوَّلِ

أَوْلَهُمْ بِالْمِيْرَاثِ أَقْرُبُهُمْ إِلِيَ الْهَيِّتِ كَبِنْتِ الْبِنْتِ قَاتَهَا أَوْلِيَ مِنْ بِنْتِ بِنْتِ الْإِبِي وَإِنِ الْشَوَ وَانِي التَّرَجَة فَوَلَدُ الْوَارِثِ أَوْلِيَ مِنْ وَلدَدُوي الْأَرْحامِ كَينْتِ بِنْتِ الْإِبنِ أَوْلِي مِنِ ابِنْ بِنْتِ الْبِنْتِ وَإِنِ اسْتَوَتْ دَرَجَا تُهُمْ وَلَمْ يَكُنْ فَيْهِمْ وَلَدُ الْوَارِثِ أَو كَانَ كُلُّهُمْ وَلَدَ الْوَارِثِ فَعَنْدَ أبِي يوسف رِحمة الله و الحسن بن زياد يعتبر ابدان الْغُرُوْعِ وَيُقْسَمُ الْهَالَ عَلَيْهِمْ سَوَاءً تَعَقَّ صِعَةُ الْأُصُولِ

ني النَّكُورَةِ و اللَّا نُوثَةِ أُو إِخْتَلَغَتْ وَ مُحَمَّدٌ رَحِهِ اللَّهَ

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يَنْتَهِي إِلَي جَدَّيِ الْهُيِّتِ أَوْجَدَّتَيْهِ وَهِيَ الْعَهَّاتُ وَالْأَعْبَامُ لِلْمْ وَالْأَذْ وَالْ وَالْخَالَاتُ فَهُ وَلا وَكُلُّ مَنْ يَدْلِي إِلَيَ الْهَيِّتِ بِهِمْ مِنْ ذِوَي الْارْحَامِ رَوِي أَبُو سَلَيْهَانَ عَنْ صَحَمَّدِ ابْنِ الْحَسَنِ عَنْ أَبِيْحَنِيغَةُ رَحِهِم اللَّهُ إِنَّ اقْرِبَ الْأَصْنَافِ الصِّنْفُ الثَّانِي وَإِنْ عَلَوْا ثُمَّ الْأَوْلَ وَإِنْ سَغَلُو ثُمَّ الثَّالِثُ ر ه رده سی تا در ه ردد ه ر بر عده ده واور وي ابويوسف والحسن والحسن الْأُوَّلُ ثُمْ الثَّانِيُ ثُمَّ الثَّالِثُ ثُمَّ الَّرابِعُ كَتَرْتَيِبُ الْعَصَبَاتِ وَ هُوَ الْإِلَّةُ وَلَا لِلْغَنُّوي وَعِنْدَ هُهَا الصِّنْفُ الثَّالِثُ مُعَدَّمٌ عَلَي الْجَدِّابِ اللَّمِ لِّنَّ عِنْدَ هَهَاكُلُّ واَحِدٍ مِنْهُمْ أُولَي مِنْ

بأَبْذُويالأَرْحَام

وَنُوالرِّحِمِ هُوكُلِّ قَرِيْبٍ لَيْسَ بِذِي سَهْمٍ وَلَاَعْصَيَّة كَانَتْ عَامَّةُ الصَّحَابَةِ يَرُوْنَ تَوْرِيْثَ ذَوِي ٱلْأَرْحَامِ وَبِهِ قَالَ أَصْحَابُنَا وَمَنْ تَابَعُهُمْ رَحِمُهُمْ اللَّهُ تَعَالِيَ وَقَالَ زَيْدُ بْنَ تَابِتَ رَضِي اللَّهُ عَنْهُ لا مِيْرَاثَ لِدُوي ٱلْأَرْحَامِ وَيُوضَعُ الْهَالَ فِي بَيْتِ الْهَال وبِهِ قَالَ مَالِكُ وَالشَّا فِعِيُّ رَحِمَهُمَا اللَّهُ تَعَالَي وَكُوي الْأَرْحَامِ أَصْنَافُ أَرْبَعَةُ الصِّنْفُ ٱلْأُوَّلَ ينَتْهِي إِلَي الْهَيِّتِ وَهُمْ أُولَا ثُ البُنَاتِ وَأَوْ لا دُبِنَاتِ الْإِبْنِ وَالصِّنْفُ النَّانِي يَنْتَمِي إليْرِ الميت و هم الا جداد السَّاقطون و الجدَّات السَّاقطَات وَ الصِّنْفُ الثَّالِثُ يَنْتُمِي إِلَيَ أَبُوِيَ الْهَيَّتِ وَهُمْ أَوْلَانُ الْأَخُواتِ وَبِنَاتُ الْإِخُوةِ وَ بَنُوا ٱلإِخُوةِ لِلَّمْ وَالصِّنْفُ الَّرابِعُ

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الهماثلة ماني يده مِن التَّصْحِيْحِ الأُولِ على التَّصْحِيْحِ الثَّانِي فَالْحَاجَة إِلَى الضَّرْبِ وَإِنْ لَمْ يَسْتَعْمُ فَانْظُرِ إِنْ كَانَ بينهما موافقة فاضرب وفق التصحيح الثاني في جميع التَّسْحَيْجِ الْلُوَّلِ وَإِنْ كَانَ بَينَهَا مَبَايَنَةَ فَاضِرِب كُل التَّصْحِيْجِ الثَّانِي فِي كُلِّ التَّصْحِيْجِ الأُولِ فالمِبلغ مخرج ٱلهَشَّلَتَيْنِ فَسِهَامُ وَرِثَةَ الْهَيِّتِ ٱلْأَوَّلِ يَضْرَبُ فِي الْهُضْرُوبِ اعْنِي فِي التَّصْحِيْحِ الثَّانِي أُونِي وَ نَعْمِ وَسِهِمُ ورثَةَ الْهِيتِ الثَّانِيْ يُضْرَبُ فِي كُلِّ مانِيْ يكِهِ أَوْفِيْ وَفْقِه وِانْ ماتَ ثَالِثُ أَوْرَابِعٌ فَاجْعَلِ الْمَبْلَغَ الثَّانِيَ مَعَامَ الْأَوَّلِ وَالثَّالِثَ مَعَامَ الثَّانِي فِي الْعَهَلِ ثُمَّ فِي آلرابِعِ وَالْخَامِسِ كَذَلِكُ إلَى غَيْرِ النَّهَايَة

و تعول إلى تسِعة و تصح مِن سَبعة وعشرين إنَّها سبِّيت أَكْدَرِيَّةً لِأَنَّهٰ وَاتِعَةً فِي الْمَراةَ مِنْ بَنِي أَكْدَرَو لَوْكَانَ مَكَانَ اللَّهٰتِ أَخَّ أَوْ أَخْتَانِ فَلَا عَوْلَ وَ لَا أَكْدَرِيَّةَ

بأب الهناسكة

وَ لُوْصَارَ بَعْضَ الْأَنْصِبَا عِمِيْراَتًا تَبْلَ الْعَسْمِةَ كَزُوْج وَ بِنْت وَأَمْ فَهَاتَ الزُّوجِ قَبْلُ الْقِسْهَةِ عَنِ امْرَاةٍ وَأَبُوينِ ثُمَّ مَاتَتَ الْبِنْتُ عَنْ إِبَنْيْنِ وَبِنْتٍ وَجَدَّةٍ تَمْ مَاتَتِ الْجَدَّةِ عَنْ زُوج رة رو مده و سهام كل و ارث من هذ التَّصَيْع ثم تصحيح مسنلة

الْهِيِّتِ النَّانِي وَتنظريين مَانِي يدِهِ مِنَ التَّصْحِيْحِ الْاولِّ

وَبِينَ التَّصْحِيْجِ الثَّانِي إلَي ثَلَا ثَةِ أَحُوالٍ فَإِنِ اسْتَعَامَ بِسَبَب

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لاً وَالْمُ وَالْمَا سُدُسُ جَهِيعِ الْهَالِ كَجَدٌّ وَجَدَّةٌ وَبِنْتُ وَالْحَوْنِينِ وَإِذَا كَانَ ثُلْثُ الْبَاتِي خَيْراً للْجَدّ وَلَيْسَ لِلْبَاتِي ثُلْثُ صَحِيْحٌ فَاضْرِبٌ مَخْرَجَ التَّلَثِ فِي أَصْلِ الْهِسْلَةِ فَإِن تَرَّكُتُ جَدًّا وَزَوْجًا وَبِنْتًا وَأَمًّا وَأَخْتَالَّابٍ وَأَمْ أَوْلَابٍ فَالسَّدُسُ خَيْرٌ لِلْجَدِّ وَتَعُولُ الْهَسْئَلَةُ إِلَى ثَلَا ثَةَ عَشَرَ وَلَشَيُّ لِلْلَّخْتِ وَ اعْلَمْ أَنَّ زَيْكَ بْنَ ثَابِتٍ رَضِيَ اللَّهُ عَنْهُ لَا يَجْعَلُ اللَّهٰتَ لَّا وَأَمْ اللَّهِ مَاحِبَةَ فَرْضٍ مَعَ إِلْجَدَّ الَّافِي الْهَسْلَةِ الْأَكْدَرِيَّةُوَهِيَ زَوْجٌ وَأُمَّ وَجَدَّوَ أَخْتُ لِآبٍ وَأُمَّ أُولِابٍ لِلزَّوْجِ النَّصْفُ وَللَّمْ النَّلْثُ وَللَّجَدِّ السَّدس وَلِلْأَخْتِ النَّصْف ثُمَّ يَضُمُّ الْجَدُّ نَصِيبَه إِلَى نَصِيبِ الْآخْتِ فَيَعْسَهَانِ للِذَكْرِ مِثْلُ حَظًّا لانْتُينِ لِأِنَّ الْهِ عَاسَهَةَ خَير لَجَد اصلها مِنْ سِتَّةٍ

بَنُو الْعَالَاتِ يَدْ خُلُونَ فِي الْقِسْمَةِ مَعَ بِنِي ٱلْعُيَانِ إِضْرَارًا لِلْجَدِّ فَإِذَا أَخَذَ الْجَدِّ نَصِيبَهُ فَبَنُو الْعَلَّاتِ بَخْرِجُونَ مِنَ الْبَيْنِ خَايِبِيْنَ بِغَيْرِ شَيٍّ وَالْبَا قِيْ لِبَنِي الْأَعْيَانِ إِلَّا إِذَا كَانَتْ مِنْ بَنِي ٱلا غْيَانِ أَخْتُ وَاحِدَةً اَخَذَتْ فَرْضَهَا أَعْنِي الْكُلِّ بِعَدُ نَصِيبِ الْجَدِّ فَإِنْ بِعَي شَيْ فَلَبْنِي الْعَلَّاتِ وَ اللَّا فَلَا شَيْ لَهُمْ وَ ذَٰلِكَ كَجَدِّ وَأَخْتٍ لِأَبِوَأُمِّو أَخْتَيْنِ لِأَبٍ فَبَعِيَ لِلْأَخْتَيْنِ لِأَبِ عَشْرِ الْهَالِ وَ تَصح مِن عِشْرِينَ و لُوكَانَتُ فِي هِذِهِ الْهِسَلَةِ أَخْتُ لَابٍ لَمْ يَبَقَ لَهَاشِيُّ وَإِنَّا خَتَلَطَبِهِمْ نُوسَهِم فَلْكَجَدِّ هُهِنَا أَنْصَلْ ٱلْا مُوْرِ الثَّالَاتَةِ بَعْدَ فَرْضِ ذِي سَهْمِ أَمَّا الْهُ قَاسَهُ تَحَرُوجِ وَجَدَّ وَأَخْ وَأَمَّا ثُلْثُ مَا يَبْغَي كَجَدَّ وَجَدَّةٍ وَأَخُويْنِ وَأَخْتِ

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w. VSM (I SK Sinha مَن لاَ يَرِق عَلَيْهِ فَاءِنِ انْكُسُر عَلَي البَعْضِ صَحِّعَ الْهَشَبِّلَةُ بِالْأَصُّوْلِ الْهَٰذِكُورَةِ

بأب مقاسمة الجر

تَالَ ٱبُوْبِكُ لِالصَّدْيْقِ رَضِيَ اللَّهُ عَنْهُ وَ مَنْ تَابَعَهُ مِنَ الصَّحَابِة بَنُوا الْأَعْيَانِ وَبَنُو الْعَلَّتِ لَا يَرِثُونَ مَعَ الْجَدِّوَهَٰذَا قَوْلُ أَبِيْ حَنِيْفَةَ رَحِهَ اللَّهُ وَبِهِ يُغْتَى وَقَالَ زَيْدٌ بْنَ ثَابِتٍ رِدُونَ مَعَ الْجَدِّ وَ هُو قُولُهُمَا وَقُولُ مَالِكٍ وَ الشَّافِعِي رَحِهُ وَ اللَّهُ تَعَالَي وَعِنْدَ زَيدُ بِنْ ثَابِتٍ رَحْهَ اللَّهِ تَعَالَي عَلَيْهُ لِلْجَدِّ مَعَ بَنِي الْأَعْيَانِ وَالْعَلَّتِ أَنْصَلَ الأَمرِينِ مِنَ الْهُ قَالَسَهُ وَ مِنْ ثُلُثِ جَهِيعٌ الْهَالِ وَتَغْسِيرُ الْهُ قَاسَمُ أَنْ يَجْعَلُ الْجُدُّ فِي الْقَسْهَةِ كَاحَدٍ مِنَ ٱللَّخُوةِ وَ

عَدُورُ وَسِهِمْ فِي مُخْرِجَ فِرضِ مَنْ لَا يُرِدُ عَلَيْهِ فَالْهِبَلْغُ مِنْهَا تُصْمِ الْمُسْلَةُ وَالرَّابِعِ أَنْ يَكُونَ مَعَ الثَّانِي مَنْ لَا يُرِدْ عَلَيْهُ فاقسم ما بقي من مُخرج فرض من لا يرد عليه علي مَشَّبَلةِ مَنْ يَرَدُّ عَلَيْهِ فِإِنِ اسْتَعَامَ الْبَاتِيْ فَبِهَا وَ هَذافِيْ صُورَة وَ احدة وَهِيَ أَنْ يَكُونَ لِلَّرْوَجَاتِ الرَّبْعُ وَ يَكُونَ الْبَاقِيْ بَيْنَ أَهْلِ الرَّدَّأُ ثُلَاثًا كَزَوْجَةٍ وَجَدَّةٍ وَ أَخْتَيْن لِأُم وَإِنْ لَمْ يَسْتَقَعْ فَاضْرِبْ جَمِيعٌ مَسْبَلَةً مَنْ يَرَدٌّ عَلَيْهِ فِي مُخْرَجِ فَرْضِ مَنْ لَا يَرَدُّ عَلَيْهِ فَالْهَبِلَغُ مُخْرَج فَرُوضٍ الْغُرِيْقَيْنِ كَأَرْبِعَ زُوجَاتٍ وَ ثُسْعِ بِنَاتٍ وَسِتَّ جَدَّاتٍ تُمَّ اضْرِبٌ سِهَامَ مَنْ لَا يُرَدُّ عَلَيْهِ فِي مَسْبَلَةِ مَنْ يُرَدُّ عَلَيْهِ وَسِهَامُ كُلِّ مَنْ يُرَدُّ عَلَيْهِ فَيها بَقِيَ مِنْ مَخْرَج فَرْضِ

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وَ الثَّانِي إِذًا اجْتَهَعَ نِي الْهَسَلَّةِ جِنسَانِ أُوثُلَاثَةَ أَجْناسٍ مِمَّنْ يُرَدُّ عَلَيِهُ عِنْدَ عَدْمِ مَنْ لاَيْرَدُّ عَلَيْهِ فَاجْعَلِ الْهَسْبَلَةُ مِنْ سِهَا مِهِمْ أَعِنْي مِنْ اِثْنَيْنِ انْكَانَ فِي ٱلْهَسْتُلْقِسْدُسَانِ أُومِنْ ثَلَاثَة إِذَا كَانَ فيها ثُلُثُ و سُدُسٌ أُوْمِنْ أَرْبَعَة إِذَا كَانَ فِيْهَانضِفُ وَسُدُسُ أَوْمِنْ خُهُسَةً إِذَا كَانَ فَيْهَا تُلْتَانِ وَسُدُسٌ أَوْنِضُفَ وَسُدُسَانِ أَوْنِضُفُ وَتُلَثُّ وَالتَّالِثُ أَنْ يَكُونَ مَعَ الْأُوَّلِ مَنْ لَا يُرَدُّ عَلَيْهِ فَاعْطِفَرْضَ مَنْ لَا يرَدُّ عَلَيْهِ مِنْ أَتَّلِّ مُخَارِجِهِ فِأَنِ اسْتَعَامَ الْبَاقِي عَلَي رُوِس مَنْ يَرِدٌ عَلَيْهِ فَبِهَا كَنُوجٍ وَثَلَاثِ بِنَاتٍ وَإِنْ لَمْ يَسْتَعْمِ فَأَضْرِب وَنْقُ رُوسِهِمْ فَي مَخْمَرِجِ فَرْضٍ مَنْ لَا يُرِدٌ عَلَيْهِ أَنْ وَانْعَ رُوْسُهُمُ الْبَاتِيْ كَزَوْجٍ وَسِتِّ بَنَاتٍ وَ إِلَّا فَاضْرِب كُلَّ

بَابُ الَّرِدِّ ٱلرِدُّضِدُّ الْعَوْلِ

وَ هُوِنْيِهِ أَنْصَلَ عَنْ فَرضِ ذَوي الغُروضِ ولا مُسْتَحِقً لَهُ يُرَدُّ ذَٰلِكَ عَلَي دَوِي الْغُرُوضِ بِعَدْرِ حُغُوْتِهِمْ إِلَّا عَلَي الزَّوجِينِ وَهُو تُولُ عَامَّةِ الشَّحَا بِةَ كَعَلِيَّ وَمَنْ تَا بَعَهُ رَضِيَ اللَّهُ عَنْهِمْ وَبِهِ أَخَذَ أَصْحَا بِنَا رَحِمْهُم اللَّهُ وَقَالَ زَيْنَ بْنُ ثَابِتَ لَا يُرَدُّ الْغَا ضِلُّ بَلْ هُو لِبَيْتِ الْهَالِ وَ بِهِ أَخَذَ عُرْوَةً وَالزَّهْرِي وَمالَكَ وَالشَّانعيِّي رَحِهُمْ اللَّهُ تَعَالَى مع مسأبلِ البابِ أقسام أربعة أحدهاان يكون في الْهُنْبَلَةِ جِنْسٌ وَ احِدُ مِهَّنْ يُرَدُّ عَلَيْهِ عِنْدَعَدِمِ مَنْ لَا يُرَدَّ عَلَيْهُ فَاجْعُلِ ٱلْهَسْئِلَةَ مِنْ رُوْسِمْ كَهِ إِذَا تُرَكُ الْهَيِّتُ بِنْتَيْنِ أَوْ أَخْتَيْنِ أَوْجَدَّتِينِ فَاجْعَلِ ٱلْهَسْئِلَةَ مِنْ اثْنِيْنِ

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M. VSM (I SK Sinha بَيْنَهُمَا سَبَا يَنَةُ فَاضْرِبُ فِي كُلِّ التَّرِكُرُقُمُّ اتْسِمِ الْحَاصِلُ عَلَي جَرِيْعِ تَصْحِيحِ الْهُسَلَةِ فَالْخَارِجَ نَصِيبَ فَالَكَ عَلَي جَرِيْعِ تَصْحِيحِ الْهُسَلَةِ فَالْخَارِجَ نَصِيبَ فَالَكَ الْفَرِيْقِ فَي الْوَجْهَيْنِ وَ أَمَّافِيْ تَضَاءِ التَّيُونِ فَكَيْنَ الْفَرِيْقِ فِي الْوَجْهَيْنِ وَ أَمَّافِيْ تَضَاءِ التَّيُونِ فَكَيْنَ كَلَيْنَ حَلِيمِ بَهِنْزِلَةً التَّنْصَحِيمِ عَلَيْ اللَّهُ التَّنْصَحِيمِ عَلَيْ اللَّهُ اللَّهُ التَّهُ التَّهُ اللَّهُ اللللْهُ اللَّهُ الْمُلْمُ الْمُنْ اللَّهُ اللَّهُ اللَّهُ اللَّهُ الْعُلْمُ اللَّهُ الْمُنْ الْمُنْ الْمُنْ الْمُنْ الْمُنْ الْمُنْ اللَّهُ الْمُنْ اللَّهُ اللَّهُ الْمُنْ اللَّهُ الْمُنْ الْمُنْ الْمُنْ الْمُنْ الْمُنْ الْمُنْ ا

فَصْلٌ فِي التَّخَارِج

مَنْ صَالَحَ عَلَي شَيْ مِنَ التَّرِكَةِ فَاطُرُحْ سِهَا مَهُ مِنَ التَّرَكَةِ فَاطُرُحْ سِهَا مَهُ مِنَ التَّكُ عِلَي سِهِمِ الْبَاقِينَ التَّرَكَةِ عَلَي سِهِمِ الْبَاقِينَ كَنَّةُ لِلَّرُوجَةِ كَنَوْجَ وَأَمْ وَعَمْ فَصَالَحَ الزَّوْجَ عَلَي بَاقِي نَامِتُهُ لِلْرُوجَةِ مِنَ الْبَيْنِ فَيُقَسِمُ بَاقِي التَّرِكَةِ بِينَ مِنَ الْبَيْنِ فَيُقَسِمُ بَاقِي التَّرِكَةِ بِينَ اللَّمِ وَالْعَمِّ أَثَلَاتًا بِغَلْرِسَهَا مِهِمًا وَح يَكُونَ سَهَهَانِ لَلْمُ وَالْعَمْ أَثَلَاتًا بِغَلْرِسَهَا مِهِمًا وَح يَكُونَ سَهَهَانِ لَلْمُ وَالْعَمْ فَالِكُمْ وَالْعَمْ وَالْعَمْ وَالْعَمْ أَثَلُاتًا بِغَلْرِسَهَا مِهِمًا وَح يَكُونَ سَهَهَانِ لَلْلُمْ وَالْعَمْ وَلَيْ عَلَيْ وَالْعَمْ وَلِيْ وَالْعَمْ وَالْعَمْ وَالْعَمْ وَالْمَا وَلَاعَالَى اللَّهُ وَالْعَمْ وَالْعَمْ وَالْعَلَاقِي وَالْعَمْ وَالْمَالِ وَلَاعَمْ وَالْعَلَاقِي وَالْعَمْ وَالْعَلَاقِ وَلَاعَمْ وَالْعَلَى وَلَالْعَالِيْنَ فَلَالِمُ وَالْعَمْ وَلَالْعَا فَلَالِمُ وَالْعَمْ وَلَاعَمْ وَلَاعَالَ وَلَا عَلَالْعَا وَلَاعَا وَلَاعَا وَلَاعَا وَلَا عَلَا عَلَى وَلَاعَا وَلَا عَلَاقِي وَلَا عَلَا عَلَا عَلَيْ وَلَا عَلَى الْعَلَاقِ وَلَاعَا وَلَا عَلَا عَلَى وَلَا عَلَيْنَ وَلَا عَلَى الْعَلَاقِ وَلَاعِلَا عَلَى وَلَا عَلَى الْعَلَالْعِلْ فَالْعِلَاقِ وَلَا عَلَى الْمَا عَلَى فَالْمُ وَالْعَلَاقِ وَلَا عَلَا عَلَى وَلَا عَلَى وَلَا عَلَى فَلَا وَالْعَلَاقِ وَالْمَلِكُونَ وَالْعَلَاقِ وَلَاعِلَا عَلَى فَلَاقِ وَلَا عَلَالَاقُ وَلَا عَلَالِهُ وَلِي وَلَاعِلَى فَلَاقُ وَالْعَلَاقِ وَالْعَلَاقِ وَالْعَلَاقُ وَالْعَلَاقُ وَالْعَلَاقُ وَالْعَلَاقُ وَالْعِلْمُ وَالْعَلَاقُ وَالْعَلَاقُ وَالْعَلَاقِ وَلَاقُولُ وَالْعَ

فَصْلِّ فِي قِسْهُ قِا لَتَّرِكَاتِ بَيْنَ الْوَرَثَةِ وَ الْغُرَمَاءِ انِكَان بين التِّركةِ والتَّصَحِيْح مباينة فاضرب سِهام كلَ واردس التصحيح في جريع التركة ثم اقسم المبلغ علي التَّصْحِيْحِ وَإِذَا كَانَ بِينَ التَّصْحِيْحِ وَ التَّرِكَةِ مُوا فَعَةُ فَاضِرِب سِهام كُلُّ وارثٍ مِن التَّصْحِيْجِ فِي وَفَقِ التَّرِكَةِ ثم اقسم المبلغ على وفق التَصْحِيْج فالخارج نصيب ذلك الْوَارِثِ فِي الْوَجْهَيْنِ هَٰذَا انَّهَا هُوَ لِهَعْرِفَةِ نَصِيْبِ كُلِّ فَرْدٍ مِنَ الْوَرَثَةِ وَأَمَّا لِمَعْرُفَة نصِيبٍ كُلِّ فِرَيتُ مِنْهُمْ فَاضْرِبْ مَاكَانَ لِكُلِّ فَرِيغٌ مِنْ أَصلِ الْهَسْبَلَةِ فِي وَنْقِ التَّرِكِة ثُمَّ أُقسِمِ ٱلْبَلَغ ٱلْحَاصِلَ عَلَي وَنْقِ الْهُسْبِّلَةِ انْكَانَ بِيْنَ التَّرِكَةِ وَ الْهَسْبِّلَةِ مُوَافَقَةٌ وَ إِنْكَانَ

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Baljit S M, VSM (I SK Sinha وَإِذَا أَرَدْتَ أَنْ تَعْرِفَ نَصِيْبَ كُلَّ وَاحِدٍ مِنْ أَخَادِ ذُلِكَ الْغِرِيْقِ مِنَ الْتَصْحِيْحِ فَاتْسِمْ مَاكَانَ لَكِلِ فِرِيقٍ مِن أَصْلِ الْهُسْلِلَةَ عَلَي عَدَدَ رُوِّسِهِمْ ثُمَّ اضْرِبِ الْخَارِجِ فِي الْهُضْرُوبِ فَالْحَاصِلِ نَصِيْبُ كُلَّ وَاحِدٍ مِنْ أَحَادِ ذَلِكَ الْغَرِيقِ وَوَجَهُ آخَرَانَ تَعْسِمُ الْهُضْرُوبَ عَلَى أَيِّ شِبْتَ ثُمَّ تَضْرِبِ الْخَارِجَ فِي نَصِيْبِ الْغَرِيْفِ الَّذِي تَسَمْتَ عَلَيْهِمِ الْبَصْرُوبَ فَالْحَاصِلْ نَصِيْب كُلَّ وَاحِد مِنْ أَحَادِ ذُلِكَ الْغَرِيثِ وَوَجِهُ أَخْرُوهُ وَطَرِيْقُ النِّسَبَةِ وَهُو الْأُوسَى فَهُوَ أَنْ يُنْسَبَ سِهِامُ كُلِّ فَرِيتًا مِنْ أَصْلِ الْهَسَبَلَةِ الِّي عَدُورُ وَ سِهِمْ مَغْرَدًا ثُمَّ يَعْطَي بِهِثْلِ تِلْكَ النَّسْبَةِ مِنَ الْهَضْرُوْبِ لِكُلِّ وَ احِدٍ مِنْ أَحَادِ ذَٰلِكَ الْغَرِيْقِ

ٱلْهَبْلَغْ فِي أَصْلِ الْهُسْنَلَةِ كَأْرَبِعِ زَوْجَاتٍ وَتُهَانِي عَشَرَةَ بِنَتَّا وخَيْسَ عَشَرَةً جَدَّةً وَسِنةً أَعْهَامٍ وَالرَّابِعِ أَنْ تُكُونَ الْأَعْدَادُ متباينة لا يوافق بعضها بعضًا فالصكم فيها أن يضرب احد الْأَعْدَا دِ فِيْ جَمِيْعِ الثَّانِيُ ثُمَّ يُضْرَبُ مَا بَلِغَ فِيْ جَمِيْعِ الثَّالَت ثُمَّ مَا بَلَغَ فِي جَمِيْعِ الَّرابِعِ ثُمَّ يَضْرَبُ مَا اجْتَهَعً فيْ أَصْلِ الْهُسُنِّلَةِ كَامْرَ أَتَيْنِ وَسِتِّ جَدَّاتٍ وَعَشَرة بَنَاتٍ وَ سَبْعَة أَعْهَامٍ

فَصْلّ

وإِذَا الرَّدُتَ أَنْ تَعْرِفَ نَصِيبُ كُلَّ فِرِيثٍ مِنَ التَّصْحِيْمِ وَإِذَا الرَّدُتَ أَنْ تَعْرِفَ نَصِيبُ كُلَّ فِرِيثٍ مِنَ التَّصْحِيْمِ فَأَضْرِبُ مَا كَانَ لِكُلِّ فِرِيْتٍ مِنْ أَصْلِ الْهَسْئَلَةِ فِيْهَاضَرَبْتَهُ فَيْ أَصْلِ الْهَسْئَلَةِ فِيْهَاضَرَبْتَهُ فَيْ أَصْلِ الْهَسْئَلَةِ فِيْهَاضَرَبْتَهُ فَيْ أَصْلِ الْهَسْئَلَةِ فَيْهَا حَصَلَ كَانَ نَصِيْبُ ذَٰلِكَ الْفَرِيْفِ فَيْ أَصْلُ الْهَسْئَةِ فَهَا حَصَلَ كَانَ نَصِيْبُ ذَٰلِكَ الْفَرِيْفِ

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أَصْلِ الْهَسْلَةَ كَنَرُوْجٍ وَخَهْسِ أَخَواَتٍ لَابٍ وَ أُمَّ وَأُمَّا الْأَرْبَعَةُ فَأَحَدُهَا أَنْ يَكُونَ الْكُسْرِ عَلَي طَأَنْعَتَيْنِ أَوْ أَكْثَرَ وَلَكِنَ بَيْنَ اعْدَادِ رُوِّسِمْ مَهَا تَلَةً فَالْكُلُمُ فِيهَا أَنْ يُصْرَبَ احَدُ الْأَعْدَادِ فِيْ أَصْلِ الْهَسْنَلَةِ مِثْلُ سِتِّ بِنَاتٍ وَتَلْثِ جَدَّاتٍ وَ تَلَاثِةَ اَعْهَامٍ وَالثَّانِيُ أَنْ يَكُونَ بَعْضُ الْأَعْدَادِ فِي بَعْضِ متن اخِلًا فَالْحَكُم فِيهَا أَنْ يَضْرَبَ أَكْتُر الْأَعْدَادِ فِي أَصْلِ الْهَسْنَلَةِ كَأَرْبِعَ زَوْجَاتٍ وَ تَلَاثِ جَدَّاتٍ وَ الْنَي عَشَرَعَها وَالثَّالثِ أَنْ يُوافِقَ يَعْضُ الْأَعْدَادِ بَعْضًا فَالْحَكُم فِيْهَا أَنْ يُضْرَبَ وَنْقُ أَحَدِ الْأَعْدَادِ فِيْ جَمِيْعِ الثَّالِيْ أَبْمُ مَا بَلَغَ فِيْ وَنْقِ الثَّالِثِ إِنْ وَافَقَ الْهَبْلَعُ الثَّالِثَ وَإِلاَّ فَالْهَبْلَغُ فِيْ جَهِيْعِ الثَّالِثِ ثُمَّ فِي الرَّابِعِ كُلْلَكُ ثُمَّ يَضُوبُ

باب التَّصْحِيْحِ

يَحْنَاجَ فِي تَصْحِيْمِ الْهُسَانِلِ الِّي سَبْعَة أَصُولٍ ثَلَاثَةٌ مُنْهَا بَيْنَ السِّهَامِ وَالرُّوسِ وَأَرْبَعَةٌ مِنْهَا بَيْنَ الرُّوسِ وَلرُّوسِ أَمَّا الثَّلَاثَةُ فَأَحَدُهَاإِنْ كَانَ سِهَامٌ كُلِّ فَرِيتْ مُنْفَسِهَةً عَلَيْهِمْ بِلا كَسْسٍ فَلا حَاجَةَ إِلَيَ الضَّرْبِ كَابُّونِينِ وَبِنْتَنْينِ وَالثَانِي هُوَأَنْ يَنَكُسِرَ عَلَي طَايِغَةً وَاحِدَةٍ نَصِيْبُهُمْ وَلَكِنْ بَيْنَ سِهامِمِمْ وَرُوْسِهِمْ مُوانَعَةً نَيْضَرَبْ وَنْقُ عَدِدِ رُوْسِ مِنَ انْكَسَر عَلَيْهِمِ السَّهَامُ فِي أَصْلِ الْهَسْلَةَ وَعَوْلِهَا إِنْ كَانَتْ عَالِلَةً كَأَبُويْنِ وَعَشِر بَنَاتٍ أَوْنَرُوْجٍ وَ أَبُويَنِ وسِّتِ بِنَاتٍ و الثَّالِثِ أَنْ يَنْكُسِرَ سِهَامُهُمْ وَلايَكُونَ بَيْنَ سِهَامِهِمْ وَبْرُوْسِهِمْ مُوَافَعَةً فَيْضَرِّبْحِ كُلِّ عَدَدِ مُرْقِسِ مِّنِ ٱنْكُسَّرَ عَلَيْهِم السِّهَام فِي

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الْعَدَةُ الْعَادَلَهِمَا مَخْرَجُ لِجِزْءِ الْوِنْقِ وَتَبَايِنَ الْعَدَدَينِ أَنْ لَا يُعِدُّ الْعَدَدَيْنِ الْمُخْتَلِغَيْنِ مَعًا عَدُدٌ ثَالِثُ أَصْلًا كَالتِّسْعَةِ مَعَ الْعَشِرَة وَطَرِيْتُ مَعْرِفةِ الْهُوَافَقَةِ وَالْهَبَايَنةِ بَيْنَ الَهِ قِدَارَيْنِ لَهُ خُتَلِغَيْنِ أَنْ يَنْقَصَ مِنَ الْأَكْثِر بِهِ قَدَارِ الْأَقُلِّ مِنَ الْخَانِبِيْنِ مَرَّةً أُومِرَارًا حَتَّي اتَّغَقَا فِي دَرَجَةٍ وَ احِدَةٍ فَانِ اتَّفَعَافِيْ وَ احِدِفلا وَنْقَ بَيْنَهُمَا وَإِنِ اتَّفَعَّافِي عَدَدٍ فَهَا هُتَوَا فِقَانِ فِي ذَٰلِكَ الْعَدَدِ فَغِي الْإِتْنَيْنِ بِالنَّصْفِ وَفِي الثَّلَاثَةِ بِالثِّلُثِ وَفِي ٱلْأَرْبَعَةِ بِالرَّبِعُ هَكَذَا الِّي الْعَشَرِة وِنَيْهَا وَمَلَّهَ الْعَشَرَة يِتَوَّا نَقَانِ لِجُنْ إِعْنُي فِيْ أَحَدَ عَشَر الحَزْءِ مِنْ أَحَدَ عَشَر وَ فِي خَيْسَةَ عَشَر الجَزْء مِنْ جَهْسَة عَشَر فِاعْتَبِرُ هُدَا

كَامْرَأَةٌ وَأُمْ وَأَخْتَيْنِ لِآبِ وَأَمْ وَأَخْتَيْنِ لِلْمْ وَابِنَ مُحْرَومٍ

عَابُ مَعْرِفَةِ التَّهَاثُلِ وَ التَّدَاخِلِ

وَ التَّوْافِقِ وَ التَّبَايْنِ بَيْنَ الْعَدَدَيْنِ

وَ التَّوَافِقِ وَ التَّبَايْنِ بَيْنَ الْعَدَدَيْنِ

تَهَاثُلُ الْعَدَدَيْنِ كَوْنَ أَحَدِ هِهَا مُسَاوِيًا لللَّخِر و تَدَاَّخُلُ الْعَدَدَيْنِ أَنْ يُعِدِّ أَتَلَّهُمَا اللَّا كُثَرَ أَيْ يَغْنِيهِ أَوْنَغُولُ تَدَاَّخِلُ الْعَدَدَيْنِ هُو أَنْ يَكُونَ اكَثْرَ الْعَدَدَيْنِ منقسها علي الاقلِ قِسهة صحيحة او نقول هواي زيدعلي الْأَقَلِّ مِثْلُهُ أَوْ أَمْثَالُهُ فَيْسَاوِي الْأَكْثَرَ أَوْنَغُولُ أَنْ يَكُونَ الْأَقَلَّ جُزُّ الْأَكْثِرِ مِثْلُ ثَلَاثَةً وتَسْعَةٍ وَتُواَفَتُ الْعَدَدَيْنِ أَنْ لَّا يُعِدَّ أَتَلَّهِمَ الْأَكْثَرُولَكِنَ يُعِدُّهُمَا عَدَدٌ ثَالِتٌ كَالتَّهَانِيَةِ مَعُ الْعِشْرِيْنَ يُعِدُّهُمَا أَرْبَعَةٌ نَهْمًا مُتَوَافِقَانِ بِالرَّبِعِ لَأَنَّ

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أَلْعُولُ أَنْ يَزَّادُ عَلَي لَهَخْرَجِ شَيْ مِّنْ أَجْزَنْهُ الْإِا ضَأَتُ الْهُ رَحْ عَن فَرضٍ إعْلَم أَن مَجْهُوع الْمُخَارِج سِبعة اربعة مِنْهَالَا تَعُولُ وَهِيَ الْإِثْنَانِ وَالثَّلَاثَةُ وَالْاَرْبَعَةُ وَالثَّهَانِيةُ وَثَلْثَةٌ مِنْهَا قَدْ تَعُولَ أَمَّا السَّنَّةُ فَتُعُولُ الِّي عَشْرِ وِتُراً أَوْشُفْعًا وَأَمَّا اثْنَي عَشَرَ فَهِيَ تَعُولُ الِّي سَبْعَةَ عَشَرَو تُرَّا لاَ شَفْعًا وَأَمَّا أَرْبَعَةٌ وَعِشْرُونَ فَإِنَّهَا تَعُولُ إِلَي سَبْعَةٍ وَعِشْرِينَ عَوْلًا وَاحِدًا فِي الْهَسْبَلَةِ ٱلْمِنْبَرِيَّةِ وَهِيَ الْمَرَأَةَ وَبِنْتَانِ وَ ابْوَانِ وَ لَايْزَادٌ عَلَي هٰذَا إِلَّا عِنْدَ ابْنِ مُسْعُودٍ رَضِي اللَّهُ عَنْهُ فَإِنَّ عِنْدَهُ تَعُولُ أَرْبَعَةً وَعَشْرُونَ اليّ إِحْدَي وَ ثَلْثِينَ

فَإِذَا جَاءً فِي الْهُسَايِلُ مِنْ هُذِهِ الْغُرُوضِ أَحَادُ أَحَادُ فَهُ عَلَى فَرْضٍ سَهِ إِلَّا النَّفْ فَانَّهُ مِنَ الْإِثْنَيْنِ كَالَّرْبِعِ مِنْ ٱرْبَعَةٍ وَالثُّهُنُّ مِنْ ثَهْإِنيَةٍ وَ الثُّلُثُ مِنْ ثَلَاثَةٍ وَإِذَا جَاءَ مَثْنَنِي ٱوْتُلَاثُ وَهُهَا مِنْ نَوْعِ وَاحِدٍ نَكُلُّ عَدُدٍ يَكُون مُخْرِجًا لِجَنْء فَذَٰلِكَ الْعَدَدُ أَيْضًا مُخْرِج لِضِعْفِ ذَٰلِكَ ٱلجَّنِّرُ وَ لضِعْفِ ضِعْفِهِ كَالسَّتَّةِ هِيَ مَخْرَجُ لِلسَّدُسِ وَلِضَعْفِهِ وَإِذَا اخْتَلَطَ النَّصْفُ مِنَ النَّوْعِ الْأُوِّلِ بِكُلِّ النَّانِي أَوْ بِبِعَضْهِ فَهُوْ مَنْ سِتَّةٍ وَ إِذَا اخْتَلَطَ الرِّبْعُ بِكِلِّ الثَّانِي أَوْ بِبِعْضِهِ فَهُو مِنْ اثِّني عَشَرَو إِذَا

الْخَتَلَطَ النُّهُنَّ بِكُلِّ النَّانِي أَوْ بِبِعَضِهِ فَهُو مَنْ أَرْبَعَثَو

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البَّرِكَةِ وَالنَّا نِي الأَ قَرَبُ فَالاَ قَرْبُ كَمْ الْمَا فِي اللَّهُ عَلَى اللَّهُ الللَّهُ اللَّهُ الللللّهُ اللَّهُ الللّهُ اللللّهُ اللّهُ الللّهُ اللّهُ الللّهُ اللللّهُ اللّهُ الللّهُ اللّهُ الل

باَبُ مَخَارِجِ الْغُرُ وضِ

اعْلِمْ أَنَّ الْغُرُوْضَ السِّنَّةَ الْبَدْ كُورَةً فِي كِتا بِاللَّهِ تَعَالَي نَوْعَانِ الْاوَّلُ النِّصْفُ وَ الرِّبْعُ و النَّهْنُ و النَّانِي تَعَالَي نَوْعَانِ الْاوَّلُ النِّصْفُ وَ الرِّبْعُ و النَّهْنُ و النَّانِي النَّلْمُ وَ النَّانُ فَي النِّذِي النَّانُ فَي النَّانُ الْعَالِمُ الْعَالَانُ الْعَالَانُ الْعَالَالْعَانُ الْعَالِمُ الْعَالِمُ الْعَلَالُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالُمُ الْعَلَالْعُولُ الْعَلَالُ الْعَلَالُولُولُولُولُولُ اللْعَلَالُولُولُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالُولُولُولُولُولُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالِمُ الْعَلَالْعُلِمُ الْعَلْعُلِمُ الْعَلِمُ الْعَلْمُ الْعَلَالِمُ الْعَلَالُمُ الْعَلَالْعُ

بأبُ الحجب

أَحْجَبْ عَلَي نُوعِينِ حَجْب نَعْصَانٍ وَهُوحَجِبْ عَنْ سَهِم إِلَى سَهْمٍ وَذَٰلِكَ لِخَهْسَةِ نَقِر لِلزَّوْجَيْنِ وَالْلَّمِ وَبِنْتِ الْإِينِ وَالْخَتِ لِأَبٍ وَتَنْ مَرْبِياً نَهُ وَحَجِب حِرمانٍ وَالْوَرِثَةُ فِيهِ فريقانِ فريق لا يحجبون بحالٍ البتة وهم سِتة الإبن وَالْأَبُ وَالَّزِوْجُ وَالْبِنْتُ وَالْأُمِّ وَالزَّوْجَةُ وَفَرِيتٌ يَرِتُوْنَ بحالٍ وليُحْجَبُونَ بِحَالٍ وَهٰذَا مَبنِّيٌّ عَلَي أَصْلَيْنِ أَحَدُ هَمَّا هُوَانَّ كُلَّ مَنْ يَدْلِي إِلَي الْمَيِّتِ بِشَخْصٍ لاَيْرِثُ مَعَ وُجُودِ ذِلَكَ الشَّخْصِ كَابْنِ الْإِ بْنِ مَعَ الْإِبنِ سِوَي أَوْلَادِ الْأُمِّ فَإِنَّهُمْ يَرِثُونَ مَعَهَا لِانْعِدَامِ اسْتَحْقًا تَهَا جَمِيْعَ

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ٱوْاكْتَكَ مَنْ أَعْتَكُنَ ٱوْكَا تَبْنَ أَوْكَا تِبَ مَنْ كَا تَبْنَ أَوْدَبَّرْنَ اَوْدَبَّرَ مَنْ دَبَّرْنَ أَوْجَرَّوَلَا مُعْتَقَهِنَّ وَلَوْتَرَكَ اَبِّا ٱلْهُ عُتِفِ وَأَبَنَهُ سُدُسُ ٱلولاَ لَالِّهِ وَالْبَا قِي لِلْإِنْنِ أَعِنْدَ هُمَا كُلَّهُ لِلْإِ بْنِ وَلَوْتَرَكَ ابْنَ الْهُعَثِّقِ وَجَّدَّهُ فَالْوَلَا ۚ كُنَّةً لِلَّهِ بُنِ بِالْإِتِّغَافِ وَمَنْ مَلَكَ ذَارَحِمٍ مُحْيَّرُم مِنْهُ عَتَقَ عَلَيْهِ وَيكُونُ وَلاَ ﴿ لَهُ كَثَلَاثِ بَنَاتٍ لِلصَّغْرَي عِشْرُوْنَ دِيْنَارًا وَلِلْكُبْرِي ثَلَا ثُوْنَ دِيْنَارًا فَاشْتَرَتَا أَبَا هَهَا بِالْحُهُسِيْنَ ثُمَّمَاتَ الْأَبُ وَتَرَكَ شَيْئًا مِنَ الْهَالِ فَالثُّلْقَانِ بَيْنَهُنَّ أَثْلَاتًا بِالْغَرْضِ وَالْبَاقِيُ بَيْنَ مُشْتَرَّتِي اللَّبِ أَخْمَا سَا ثَلَا ثَةً أَخْمَاسٍ للْكُبْرِي وَخْهُسَاهُ للصَّغْرِي فَتَصِيِّحِ مِنْ خَهْسَةِ وَأَزْ بَعِيْنَ

الْحُكُمْ فِي أَعْمَامِ الْهِيْتِ ثُمَّ فِي أَعْمَامِ أَبِيلُهُ ثُمَّ فِي أَعْمَامِ جَدِّهِ أَمَّاالْعَصَبَةُ بِغَيْرِهِ فَأَرْ بَعْ مِنَ النِّسُوةِ وَهُنَّ الَّلَا تِي فَرْضُهُنَّ النَّصِٰفُ وَالتَّلْثَانِ يصِرْنَ عَصَبَةً بِإِخُو تِهِنَّ كُمَّا ذَكُرْ نَا فِيْ حَالَاتِهِنَّ وَمَنْ لَأَفْرْضَ لَهَا مِنَ الْإِناَثِ وَأَخُوْهَا عَصَبَةٌ لاَتَصِيْرُ عَصَبَةً بِأَ خِيْهَا كَا لَعَمِّ وَالْعَهَّةِ وَأَمَّاالْعَصَبَةُ مَعَ غَيْرِهِ فَكُلِّ أَنْثَي تَصِيْرُ عَصَبَةً مَعَ أَنْثَي أَخْرَي كَالْأَخْتِ مَعَ الْبِنْتِ كَهَادَ كَرْنَاوَأَخِر الْعُصَبَاتِ مَوْلِي الْعِتَا قَةِ ثُمَّ عَصَبَتْهُ عَلَي التَّرْتِيْبِ الَّذِيْ ذَكْرُنا لَعُولِهِ عَلَيْهِ الصَّلُوةِ وَالسَّلَامِ الْوَلَاءُ لِحَهُ فَكُحَهُ النَّسَبِ وَلاَشَيُّ لِلَّا نَاثِ مِنْ وَرَثَةِ الْهُعْتِقِ لِٰقَوْ لِهِ عَلَيْهِ الصَّلَّوٰةُ وَالسَّلَامُ لَيْسَ للنِّسَا مِنَ الْوَلَا مَ شَيْ اللَّا ما اعْتَعْنَ

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يُغْسَمُ السَّدُ سُ بِينْهَمُ عِنْدَابِي يُوسُفَ رَحْهَةُ اللَّهِ عَلَيْهِ السَّدَ سُ اللَّهِ عَلَيْهِ اللَّهُ عَلَيْهِ اللَّهِ عَلَيْهِ اللَّهُ عَلَيْهُ اللَّهُ عَلَيْهِ اللَّهُ اللَّهُ عَلَيْهِ اللَّهُ اللّهُ ا

بأبالعُصَباَت

ٱلْعَصِّبَاتُ النَّسَبِيَّةُ ثَلَا ثَقَّ عَصَبَةً بِنَغْسِهِ وَ عَصَبَةً بِغَيْرِهِ وَ عَصَبَةً مَعَ عَيْرِهِ أَمَّاالْعُصَبَةُ بِنَغْسِهِ فَكُلَّ ذَكِرٍ لاَيَدُ خُلُ فِيْ نِسْبَتِهِ إِلِيَ الْهِيَتِ أَنْثَى وَهْيَ أَرْبُعَةُ اطَّنَاف خُزْرُ الهِيْتِ

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لَّإِ وَإِمَّ وَلَهُنَّ السُّدُ سُ مَعَ ٱلَّا خُتِ لَّا إِ وَ أَمِّ تَكُمِلَةً لِلثَّلْتَيْنِ وَلايَرِ ثْنَ مَعَ اللَّ خْتَيْنِ لِأَبٍ و أَمِّ اللَّالَّانُ يَكُونَ مُعَهِنَّ أَخْ لِأَبٍ فَيُعَصِّبهِنَّ وَيكُونَ الْباَقِيْ بَيْنَهُنَّ لِللَّهُكِر مِثْلُ حَظَّالْأَنْتُيَيْنِ وِالسَّا دِسِقَأَنْ يَصَرْنَ عَصِبَةً مَعَ البَّنَاتِ أُوْمَعَ بَنَاتِ الْإِبْنِ لِهَا ذَكَرْ نا وبَنُو الْأَعْيَان وَبَنُو الْعَلَّاتِ كَاتُهُ يَسْقُطُونَ بِالْإِبْنِ وَأَبْنِ الْإِبْنِ وَانْ سَغَلَ وَبِالْأَبِ بِالْآتِفَاتِ وِبِالْجَدِّ عَنْدَأَبِي حَنْيَغَةَ رَحَهُ الله تَعَالَي وَيَشْقُطُ بِنَوْ الْعِلَاَّتِ اَيْضًا بِالْأَحِ لَأَبٍ وَأُمِّو اَمَّا لِلْأَمْ فَأَخُوالْ تُلَاتُ الشَّدُ سُ مَعَ الْولَدِ أَوْلَدِ الْإِبْنِ وَأَنْ سَغَلَ أَوْمَعُ الْإِ ثَنَيْنِ مِنَ الْإِخْوَةِ وَالْأَخَوَاتِ فَصَاعِدًا مِنْ أَيِّ جِهَةٍ كَنَا وَثُلَثُ الْكُلِّ عِنْدَ عَدَمِ هُولاءِ أَلَهُ ذَكُورِينَ وَتُلَثُ مَابِقِيَ بَعْدَةَ ض أَحَدِ النَّرُوْجَيْنِ وَذِلكَ فِي مَسْنَلَّتَيْنِ زُوْجً

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الْاَ وَّ لِ ٱلنَّصْفُ وَلِلْو سُطَي مِنَ الْغَرِيثُ الْأُولِّ مَّعَ مَنْ يُوَ ازِ يُهَا السُّدُسُ تَكْمِلَةً لِلثِّلْتُلْثَيْنِ وَ لَا تُشْيُّ لِلسِّغْلِيَّا تِ اَصْلِاً الْآانُ يَكُوْنَ مَعَهُنَّ غُلَامٌ فَيُعَصِّبُهُنَّ مَنْ كَانتُ بِحَذَا يِهِ وَ مَنْ كَانتُ فَوْقَهُ لِهِنْ لَمْيَكُنْ كَا تُ سَنْهِ وَ يَسْقِطُ مَنْ دُوْ نَهُ وَ آمَّالِلَّا خَوَاتِ لَابٍ وَأَمَّ فَاكْوَالٌ خَبْسُ النِّصْفُ للْوَاحِدَةِ وَالثَّلْثَانِ لِلْإِ ثُنَيْنِ فَصَاعِدًا وَ مَعَ الْآخِ لَأَبٍ وَ إِمَّ للذَّ كِرِمِثْلُ حَظَّاللَّا نُثَيَيْنِ فَيَصْرِنَ بِهِ عَصَبَةً لِاسْتُولَ يُهم فِي الْقُرَا بِقَ الِّي الْهِيِّتّ وَلَهَّن الْبَاقِيْ مَعَ الْبَنَاتِ أُوبْنَاتِ الْإِبنِ لِقَوْلِهِ عَلَيْهِ الصَّلْوَةُ وَ السَّلَامُ إِجْعَلُوا الْأَخُواتِ مَعَ البُّنَاتِ عَصَبَةً و الْأَخُواتُ لَأَبِ كَالْأَ خَوَاتِ لِأَبِوامٌ وَ لَهُنَّ أَحْوَالٌ سَبْعٌ ٱلنَّضْفُ لِلْوَاحِدَةِ وَ الثَّلْثَانِ لِلْإِ ثَنَيْنِ نَصَا عِدًاعِنْدَ عَدَمِ ٱللَّه خَوَاتِ

. ابْنَ . . . ابْنَ بِنْتَ أَبِنَّ بِنْتُ ... أبن بنث و ابْنَ بِنْتُ . إِبْنَ بِنْتُ ابْنَ بِنْتُ اِبْنَ بِنْتُ أَبْنَ بِنْتُ ابْنَ بنت ٱلْعُلْيَا مِنَ ٱلْغُرِيْقِ ٱلْا وَ لِالْيُوارِ يُهَا آحَدٌ وَٱلْوُسْطَي مِنَ الْغَرِيثِ الْأُولِ تُوَازِيها الْعُلْيَامِنَ الْغَرِيْتِ الثَّانِي وَ السُّغْلَي مِنَ الْغَرِيغُ الْا وَّ لِ ثُوَا زِيْهَا ٱلُو سُطَي مِنَّ الْغُرِيْفِ الثَّانِي وَ الْعُلْيَا مِنَ الْغُرِيثِ الثَّالِثِ وَالسَّفْلَي مِنَ الْغَرِيفِ الثَّانِيُ تُوَا زِيهَا الْوَسْطَي مِنَ الْغَرِيْفِ الثَّالِثِ والسُّغَلِي مِنَ الْغَرِيْفِ الثَّا لِثِ لَايُوَ ازِيْهَا الْحَدُ اذَاعَرَ فْتَهٰذَافَنَقُولُ للْعُلْيَا مِنَ الْغَرِيثِ

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جَّبَنَاتِ الصَّلْبِ وَلَهُنَّ أَحْوَالٌ سِتُّ النِّصْغُ لِلْوَاحِدَةِ وَالثَّلْتَانِ لُلْإِثَنْيِنِ فَصَا عِدًا عِنْدَ عَدَم بَنَا ت الصَّلْبِ وَلَهُنَّ السَّدُسُ مَعَ ٱلواحِدَةِ الصَّلْبِيَّةِ تَكْمِلَةً للثِّلْثَيْنِ وَلَايِرِثْنَ مَعَ الصَّلِبَيْتِينِ الْإِانَ يَكُونَ بِحِذَابَهِنَ أُواسْغَلَ مِنْهِنَّ غَلَمْ فَيُعَصِّبِهِنَّ وَ الْبَا فِي بَيْنَهِنَّ لِللَّا كَرِمِثْلُ حَظَّالْانْثَيَيْنِ وَيَسْقَطْنَ كُلَّهُنَّ بِالْإِبْنِ وَلَوْتُرَّكَ ثَلْثَ بِنَاتِ ابْنِ بَعْضُهُنَّ ٱسْغَلْ مِنْ بِعَضٍ وَثَلاَ ثَ بِنَاتِ ابْنِ إِنْنِ آخَر بَعْضَهِنَّ ٱسْغَلْ مِنْ بَعْضٍ وَ ثَلَا تَ بِناتِ ابنِ ابْن ابْن آخَر بَعْضَهُنَّ ٱسْفَلْ مِنْ بِعَضْ بِهِذَهِ الصَّوْرَةِ وَتُسَبِّي مسَنْلَةُ النَّشْبِيْبِ

لِلزَّوْ جَاتِ حَالتَانِ الرِّبْعُ لِلْوَاحِدَةِ فَصَاعِدًا عُنَد عُدَمِ الْوَلِد وَ وَ لَدَ إِلْابِنِ وَإِنْ سَغَلَ وَ الثَّبْنُ مَعَ الْوَلَد أَوْوَلَدالْإبِنِ وَإِنْ سَغَلَ وَالثَّبْنَ الصَّلْبِ فَأَحْوَالُ ثَلْتُ أَوْوَلَدالْإبِنِ وَإِنْ سَغَلَ وَالثَّلْبَاتِ الصَّلْبِ فَأَحْوَالُ ثَلْتُ النِّسْفُ لِلْوَاحِدَةِ وَالثَّلْثَانِ لِلْإِثْنَانِ فَصَاعِدً اوَمَعَ الْإِبْنِ النِّشَعْ للزَّصْفُ للوَاحِدةِ وَالثَّلْثَانِ لِلْإِثْنَانِ فَصَاعِدً اوَمَعَ الْإِبْنِ للنَّاتَ اللَّذَ عَمِيْهُمْ وَبَنَاتَ الْإِبْنِ لللَّاكَةِ مِثْلُلُ حَطَّالْأَنْتَيْنِينَ وَ هُو يَعْصِبُهِنَ وَبَنَاتَ الْإِبْنِ

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رِي عَمَرَة مِن الرَّجَالِ وهم الآب والْجِدا لَهُ عِيمَ الْرَجَالِ وهم الآب والْجِدا لَهُ عِيمَ وَإِنْ عَلَا وَالَّا خِلْمِ وَالزَّرُوجِ وَتُهَانِ مِنَ النِّسَاءِ وَهُنَّ الزَّوْجَةُ وَالْبِنْتُ وَبِنْتُ الْإِبْنِ وَإِنْ سَعَلَتْ وَاللَّخْتُ لَّابِ وَأَمَّ والاخت لاب والاخت لاموالام والجدة الصحيحة وَهِيَالَّتِي لَايَدُخُلُ فِي نِسْبَتِهَا الِّيالْهِيْتِ جَدَّفَاسَهُ أُمَّالِلَّا بِ فَأَحْوَالٌ ثَلْتُ أَلْغُرضُ الْمِطْلَقُ وَهُو السَّدُسُ وَذَلَكَ مَعَ الْإِبْنِ اوَآبِنِ الْأَبِنِ وَإِنْ سَغَلَ وَالْغُرَضَ وَالتَّغْصِيْبُ مَعًاوَذَٰلَكَ مَعَ الْإِبْنَةَ أُوابُنَةِ ٱلْإِبنِ وَإِنْ سَغَلَتْ وَالتَّعْصِيْبُ الْمُحْضُ وَذَلِكَ عَنْدَعَدَمِ الْوَلْدَوْوَلَد الْإَبْنَ وان سغل والجدالصّحيح كالاب الا في اربع مسايل وسَنَذُ كُرِهَا إِنْشَاءَاللَّهُ تَعَالِيَ وَيَسْقَطَالَجِدٌ بِاللَّهِ لِّنَ الْأَبَ أَصْلُ فِي تَرابَةُ لَجَدِّ إِلَي الْهِيْتِ وَأَمَّالُولَا وَالْمِ

مُصَّرًا عَلَى اقْرَارِهِ ثُمَّ ٱلْمُوْصَّي لَهُ بَجَمِيعُ الْهَالِ ثُمَّ بَيْتُ الْهَال فَصْلُ فِي الْهُوَا نِعِ مِنَ الْأَرِثُ ٱلْهَانِيمْ مِنَ الْإِرْثِ ٱرْبَعَةُ الرِقِّ وَافِراً كَانَ أَوْنَاقِهَا وَٱلْتَتْلُ الَّذِيْ يَنَعَلَّتُ بِهِ وَجُوبُ الْقِصَاصِ اوِّ الْكُفَّارَةِ وَاخْتِلَافُ الدَّينَيْنِ وَاخْتِلَافُ الدَّارَيْنِ الْمِاّحَقِيْقَةً كَالْحَرْبِي وَالذَّمِيِّ أُوحَكُمًا كَالْهُسْتَا مَنِ وَالدِّ مِيِّ أُوالْحَرْ بِيِّنِ مِنْ دَارَيْنِ مُخْتَلَغَيْنِ وَالدَّ أَرِا نَّهَا تَخْتَلَغَيْنِ وَالدَّ أَرِا نَّهَا تَخْتَلَغَ بِاخْتَلَا فِ الْهُنْعَةِ وَالْهِلَكِ لانْقطَاعِ الْعَصْهَةِ فَيْهَا بَيْنَهُمْ بأب معر فَه الغروض و مستحقيها ٱلْغُرُوضُ الْهُقَدَّرَةُ فِيْ كَتَابِ اللَّهَ تَعَالَي سَّتَّةُ النَّصْفُ وَالرَّبْعُ وَالثَّهُنَّ وَالثَّلْثَانِ وَالثَّلْثَانِ وَالَّثْلُثُ وَالسَّدُسُ عَلَي

التَّصْعِيثِ وَالتَّنْصِيْف وَأَصْحَاب هٰذ السَّهَامِ اثنَي عَشَرَ

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وَتُكْفَيْنَهُ بِلَاتَبْذِيْرِ وَلَاتَغْنِيْرُ ثُمَّ يَغْضَي دَيْوَنَهُ مِنْ جَهِيْعِ مَابَعِيَ مِنْ مَالِهِ ثُمَّ تُنْفَذُ وَصَايَاه مِنْ ثُلْث مَا بَقِيَ بَعْدَالدَّيْنِ ثُمَّ يَغْسَمُ البَّأَوْيِ بَيْنَ وَرَثَّتِهِ بِالْكِتَابِ وَالسَّنَّةِ وَ إِجْهَاعِ الْأُمَّةِ فَيبِدَاء بِأَصْحَابِ الْغَرَايِضِ وَهُمُ الَّذِينَ لَهُرْ سِهَامٌ مُقَدَّرُةٌ فِي حِتَابِ اللَّهِ تَعَالَي ثُمَّ بِالْعَصَبَاتِ مِنْ جَهِ النَّسَبِ وَالْعَصَّبَةُ كُلُّ مَنْ يَأْخُذُ مِنَ التَّرِكَةِ مَا أَبْعَثُهُ أَصْحابِ ٱلْغَرَّ إيض وَ عَنَدالْإِنْغُوادِ يَكُورُ جَهِيْعَ أَلْهَالِ ثُمَّ بِالْعَصَبَةِ مِنْ جهة السَّبَب وَهُوَمَوْلَي الْعَتَاقَة ثُمَّ عَصَبَتُهُ ثُمَّ الرَّدِّ عَلَى ذَوِي الْغُرُوضِ النَّسَبِيَّة بِعَدْرِ حَقُوتِهِمْ ثُمَّ دُوي لْأَرْحَامِ ثُمَّ مَوْلَي الْهُوَ الاَةِ ثُمَّ الْهُ قُرَّ الْهُ قُرِّ لَهُ بِالنَّسَبِ عَلَي الْغَي بِكَيْثُ لَمْ يَثْبُتُ نَسَبُهُ مِنْ ذَلِكَ الْغَيْرِ إِذَا مَاتَ الْبَغْرِ

المالية

اَلْحَبُدُ لِللهِ رَبِّ الْعٰلَمِيْنَ حَهْدَ الشَّا كِرِيْنَ وَالصَّلُوةُ عَلَيْ خَيْرُ الْبَرِيةَ مُحَمَّدٍ وَالهِ الطَّيِّبِيْنَ قَالَ مَرْسُولُ اللهِ عَلَيْ فَي اللّهِ عَلَيْهِ وَسَلّمَ تَعَلَّمُ وَالْفَالطَّيِّبِيْنَ قَالَ مَرْسُولُ اللّهِ صَلّي اللّهُ عَلَيْهِ وَسَلّمَ تَعَلَّمُ وَالْفَرَايِضَ وَعَلّم وَاللّهَ اللّهَ مَلَيْهِ وَسَلّمَ تَعَلّمُ وَالْفَرَايِضَ وَعَلّم وَاللّهَ اللّهَ مَلَيْهِ فَاللّهَ عَلَيْهُ وَسَلّمَ تَعَلّمُ وَالْفَرَايِضَ وَعَلّم وَاللّهَ اللّهَ اللّهَ اللّهَ اللّهُ اللّهُ اللّهُ اللّهُ اللّهُ اللّهُ اللّهُ اللّهَ اللّهُ الللّهُ اللّهُ اللّهُ اللّهُ اللّهُ اللّهُ اللّهُ الللّهُ اللّهُ اللّهُ ا

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ESSAY

ON

THE LAW OF BAILMENTS.

In tutelis, societatibus, fiduciis, mandatis, rebus emptis-venditis, conductis-locatis, quibus vitæ societas continetur, magni est judicis statuere (præsertim
cum in plerisque sint judicia contraria), quid quemque cuique præstare
oporteat.

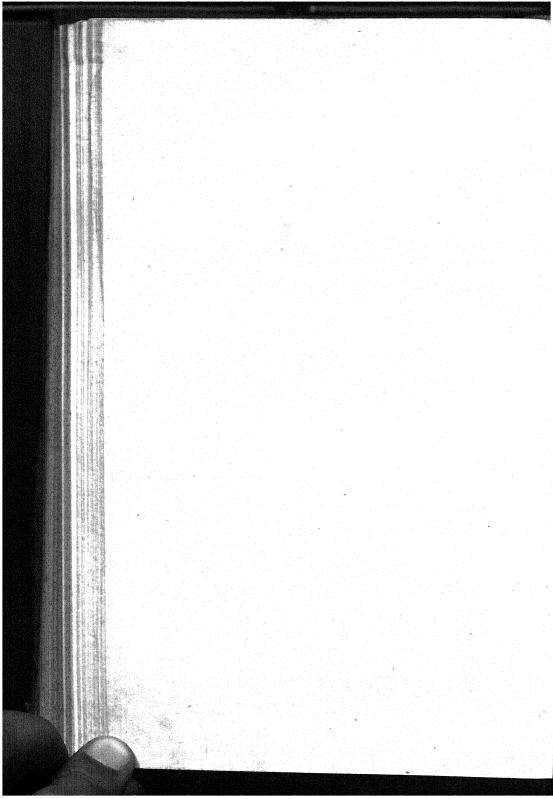
Q. Schwola, apud Cic. de Offic. lib. III.

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ESSAY

ON

THE LAW OF BAILMENTS.

HAVING lately had occasion to examine with fome attention the nature and properties of that contract, which lawyers call BAILMENT, or, A delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as foon as the purpose, for which they were bailed, shall be answered, I could not but observe with furprise, that a title in our ENGLISH law, which feems the most generally interesting, should be the least generally understood, and the least precifely ascertained. Hundreds and thousands of men pass through life, without knowing, or caring to know, any of the numberless niceties, which attend our abstruse, though elegant, fystem of real property, and without being at all acquainted with that exquisite logick, on

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which our rules of special pleading are founded; but there is hardly a man of any age or station, who does not every week and almost every day contract the obligations or acquire the rights of a birer or a letter to bire, of a borrower or a lender, of a depositary or a person depositing, of a commisfioner or an employer, of a receiver or a giver, in pledge; and what can be more abfurd, as well as more dangerous, than frequently to be bound by duties, without knowing the nature or extent of them, and to enjoy rights, of which we have no just idea? Nor must it ever be forgotten, that the contracts above-mentioned are among the principal fprings and wheels of civil fociety; that, if a want of mutual confidence, or any other cause, were to weaken them or obstruct their motion, the whole machine would instantly be disordered or broken to pieces: preferve them, and various accidents may still deprive men of happiness; but destroy them, and the whole species must infallibly be miserable. It feems therefore aftonishing, that so important a branch of jurisprudence should have been so long and fo strangely unsettled in a great commercial country; and that, from the reign of ELIZABETH to the reign of ANNE, the doctrine of bailments should have produced more contradictions and confusion, more diversity of opinion and inconfistency of argument, than any other part, perhaps, of juridical learning; at least, than any other part equally simple.

Such being the case, I could not help imagining, that a fhort and perspicuous discussion of this title, an exposition of all our ancient and modern decisions concerning it, an attempt to reconcile judgments apparently discordant, and to illustrate our laws by a comparison of them with those of other nations, together with an investigation of their true spirit and reason, would not be wholly unacceptable to the student of English law; especially as our excellent BLACKSTONE, who of all men was best able to throw the clearest light on this, as on every other, subject, has comprised the whole doctrine in three paragraphs, which, without affecting the merit of his incomparable work, we may fafely pronounce the least satisfactory part of it; for he represents lending and letting to hire, which are bailments by his own definition, as contracts of a distinct species; he says nothing of employment by commission; he introduces the doctrine of a distress, which has an analogy to a pawn, but is not properly bailed; and, on the great question of re-Sponsibility for neglect, he speaks so loosely and indeterminately, that no fixed ideas can be collected from his words*. His commentaries are

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^{* 2.} Comm. 452, 453, 454.

the most correct and beautiful outline, that ever was exhibited of any human science; but they alone will no more form a lawyer, than a general map of the world, how accurately and elegantly foever it may be delineated, will make a geographer: if, indeed, all the titles, which he professed only to sketch in elementary discourses, were filled up with exactness and perspicuity, Englishmen might hope at length to possess a digest of their laws, which would leave but little room for controverfy, except in cases depending on their particular circumstances; a work, which every lover of humanity and peace must anxioufly wish to see accomplished. The following effay (for it aspires to no higher name) will explain my idea of supplying the omissions, whether defigned or involuntary, in the Commentaries on the Laws of ENGLAND.

I propose to begin with treating the subject analytically, and, having traced every part of it up to the first principles of natural reason, shall proceed bistorically, to show with what perfect harmony those principles are recognised and established by other nations, especially the ROMANS, as well as by our English courts, when their decisions are properly understood and clearly distinguished; after which I shall resume synthetically the whole learning of bailments, and expound such rules, as, in my humble appre-

hension, will prevent any farther perplexity on this interesting title, except in cases very peculiarly circumstanced.

From the obligation, contained in the definition of bailment, to restore the thing bailed at a certain time, it follows, that the bailee must keep it, and be responsible to the bailor, if it be lost or damaged; but, as the bounds of justice would in most cases be transgressed, if he were made answerable for the loss of it without his fault, he can only be obliged to keep it with a degree of care proportioned to the nature of the bailment; and the investigation of this degree in every particular contract is the problem, which involves the principal difficulty.

There are infinite shades of care or diligence from the slightest momentary thought, or transient glance of attention, to the most vigilant anxiety and solicitude; but extremes in this case, as in most others, are inapplicable to practice: the first extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care, which the greatest miser takes of his treasure, from every man, who borrows a book or a seal. The degrees then of care, for which we are seeking, must be somewhere between these extremes;

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and, by observing the different manners and characters of men, we may find a certain standard, which will greatly facilitate our inquiry; for, although fome are exceffively careless, and others exceffively vigilant, and fome through life, others only at particular times, yet we may perceive, that the generality of rational men use nearly the same degree of diligence in the conduct of their own affairs; and this care, therefore, which every person of common prudence and capable of governing a family takes of his own concerns, is a proper measure of that, which would uniformly be required in performing every contract, if there were not strong reasons for exacting in some of them a greater, and permitting in others a less, degree of attention. Here then we may fix a constant determinate point, on each fide of which there is a feries confifting of variable terms tending indefinitely towards the above-mentioned extremes, in proportion as the cafe admits of indulgence or demands rigour: if the construction be favourable, a degree of care less than the standard will be sufficient; if rigorous, a degree more will be required: and, in the first case, the measure will be that care, which every man of common sense, though absent and inattentive, applies to his own affairs; in the second, the measure will be that

attention, which a man remarkably exact and thoughtful gives to the fecuring of his personal property.

The fixed mode or standard of diligence I shall (for want of an apter epithet) invariably call Ordinary; although that word is equivocal, and sometimes involves a notion of degradation, which I mean wholly to exclude; but the unvaried use of the word in one sense will prevent the least obscurity. The degrees on each side of the standard, being indeterminate, need not be distinguished by any precise denomination: the first may be called Less, and the second, More, Than ordinary diligence.

Superlatives are exactly true in mathematicks; they approach to truth in abstract morality; but in practice and actual life they are commonly salse: they are often, indeed, used for mere intensives, as the most diligent for very diligent; but this is a rhetorical figure; and, as rhetorick, like her sister poetry, delights in siction, her language ought never to be adopted in sober investigations of truth: for this reason I would reject from the present inquiry all such expressions as the utmost care, all possible, or all imaginable, diligence, and the like, which have been the cause of many errors in the code of ancient ROME, whence, as it will soon be demonstrated,

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they have been introduced into our books even of high authority.

Just in the same manner, there are infinite shades of default or neglect, from the slightest inattention or momentary absence of mind to the most reprehensible supineness and stupidity: these are the omissions of the before-mentioned degrees of diligence, and are exactly correspondent with them. Thus the omiffion of that care, which every prudent man takes of his own property, is the determinate point of negligence, on each fide of which is a feries of variable modes of default infinitely diminishing, in proportion as their opposite modes of care infinitely increase; for the want of extremely great care is an extremely little fault, and the want of the flightest attention is so considerable a fault, that it almost changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of trust and a deviation from common honesty. This known, or fixed, point of negligence is therefore a mean between fraud and accident; and, as the increasing series continually approaches to the first extreme, without ever becoming precifely equal to it, until the last term melts into it or vanishes, so the decreasing feries continually approximates to the fecond extreme, and at length becomes nearer to it than any affignable difference: but the last terms being, as before, excluded, we must look within them for modes applicable to practice; and these we shall find to be the omissions of such care as a man of common sense, bowever inattentive, and of such as a very cautious and vigilant man, respectively take of their own possessions.

The conftant, or fixed, mode of default I like-wife call ORDINARY, not meaning by that epithet to diminish the culpability of it, but wanting a more apposite word, and intending to use this word uniformly in the same sense: of the two variable modes the first may be called GREATER, and the second, Less, THAN ORDINARY, or the first GROSS, and the other, SLIGHT neglect.

It is obvious, that a bailee of common honesty, if he also have common prudence, would not be more negligent than ordinary in keeping the thing bailed: such negligence (as we before have intimated) would be a violation of good faith, and a proof of an intention to defraud and injure the bailor.

It is not less obvious, though less pertinent to the subject, that infinite degrees of fraud may be conceived increasing in a series from the term where gross nëglect ends, to a term, where positive crime begins; as crimes likewise proceed gradually from the lightest to the most atrocious; and, in the same manner, there are infinite degrees of accident from the limit of extremely slight ne-

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Law, as a practical science, cannot take notice of melting lines, nice discriminations, and evanescent quantities; but it does not follow, that neglect, deceit, and accident, are to be considered as indivisible points, and that no degrees whatever on either side of the standard are admissible in legal disquisitions.

Having discovered the several modes of diligence, which may justly be demanded of contracting parties, let us inquire in what particular cases a bailee is by natural law bound to use them, or to be answerable for the omission of them.

When the contract is reciprocally beneficial to both parties, the obligation hangs in an even balance; and there can be no reason to recede from the standard: nothing more, therefore, ought in that case to be required than ordinary diligence, and the bailee should be responsible for no more than ordinary neglect; but it is very different, both in reason and policy, when one only of the contracting parties derives advantage from the contract.

If the bailor only receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the bailee, who ought not to be molested unnecessarily for his obliging conduct: if more, therefore, than good faith were exacted from fuch a person, that is, if he were to be made answerable for less than gross neglect, sew men after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired.

On the other hand, when the bailee alone is benefited or accommodated by his contract, it is not only reasonable, that he, who receives the benefit, should bear the burden, but, if he were not obliged to be more than ordinarily careful, and bound to answer even for slight neglect, few men (for acts of pure generosity and friendship are not here to be supposed) would part with their goods for the mere advantage of another, and much convenience would consequently be lost in civil society.

This distinction is conformable not only to natural reason, but also, by a fair presumption, to the intention of the parties, which constitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government; but, when a different intention is expressed, the rule (as in devises) yields to it; and a bailee without benefit may, by a special undertaking, make himself liable for ordinary, or slight, neglect, or even for inevitable accident: hence, as an agreement, that a man may safely be dishonest, is repugnant to decency and morality, and, as no

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man shall be presumed to bind himself against irresistible force, it is a just rule, that every bailed is responsible for fraud, even though the contrary be stipulated, but that no bailed is responsible for accident, unless it be most expressly so agreed.

The plain elements of natural law, on the fubject of responsibility for neglect, having been traced by this short analysis, I come to the second, or bistorical, part of my essay; in which I shall demonstrate, after a few introductory remarks, that a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the ROMANS and the ENGLISH.

Of all known laws the most ancient and venerable are those of the Jews; and among the Mosaick institutions we have some curious rules on the very subject before us; but, as they are not numerous enough to compose a system, it will be sufficient to interweave them as we go along, and explain them in their proper places: for a similar reason, I shall say nothing here of the Attick laws on this title, but shall proceed at once to that nation, by which the wisdom of Athens was eclipsed, and her glory extinguished.

The decisions of the old Roman lawyers, collected and arranged in the fixth century by the order of JUSTINIAN, have been for ages, and in

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fome degree still are, in bad odour among Englishmen: this is an honest prejudice, and slows from a laudable source; but a prejudice, most certainly, it is, and, like all others, may be carried to a culpable excess.

The constitution of Rome was originally excellent; but, when it was fettled, as historians write, by Augustus, or, in truer words, when that base dissembler and cold-blooded assassin C. Octavius gave law to millions of honester, wiser, and braver men than himself by the help of a profligate army and an abandoned fenate, the new form of government was in itself absurd and unnatural; and the lex regia, which concentrated in the prince all the powers of the state both executive and legislative, was a tyrannous ordinance, with the name only, not the nature, of a law*; had it even been voluntarily conceded, as it was in truth forcibly extorted, it could not have bound the fons of those who consented to it; for "a renunciation of personal rights, espe-" cially rights of the highest nature, can have "ino operation beyond the persons of those, who " renounce them." Yet, iniquitous and odious as the fettlement of the constitution was, UL-PIAN only fpoke in conformity to it, when he faid that " the will of the prince had the force

" of law;" that is, as he afterwards explains himself, in the ROMAN empire; for he neither meaned, nor could be mad enough to mean, that the proposition was just or true as a general maxim. So congenial, however, was this rule or fentence, ill understood and worse applied, to the minds of our early NORMAN kings, that fome of them, according to Sir John Fortescue, " were not pleafed with their own laws, but ex-" erted themselves to introduce the civil laws "of Rome into the government of ENGLAND";" and so hateful was it to our flurdy ancestors, that, if IOHN of SALISBURY be credited, "they burned "and tore all fuch books of civil and canon law " as fell into their hands †:" but this was intemperate zeal; and it would have been fufficient to improbate the publick, or conftitutional, maxims of the Roman imperial law, as abfurd in themfelves as well as inapplicable to our free government, without rejecting the whole system of private jurisprudence as incapable of answering even the purpose of illustration. Many positive institutions of the Romans are demonstrated by FORTESCUE, with great force, to be far surpassed in justice and sense by our own immemorial customs; and the rescripts of SEVERUS or CARA-CALLA, which were laws, it feems, at Rome,

^{*} De Laud, Leg. Angl. c. 33. 34. † Seld. in Fort. c. 33.

have certainly no kind of authority at Westminster; but, in questions of rational law, no cause can be affigned, why we should not shorten our own labour by resorting occasionally to the wisdom of ancient jurists, many of whom were the most ingenious and sagacious of men. What is good sense, in one age, must be good sense, all circumstances remaining, in another; and pure unsophisticated reason is the same in ITALY and in England, in the mind of a Papinian and of a Blackstone.

Without undertaking, therefore, in all in stances, to reconcile Nerva with Proculus, Labeo with Julian, and Gaius either with Celsus or with himself, I shall proceed to exhibit a summary of the Roman law on the subject of responsibility for neglect.

The two great fources, whence all the decifions of civilians in this matter must be derived, are two laws of Ulpian; the first of which is taken from his work on Sabinus, and the second from his tract on the Edict: of both these laws I shall give a verbal translation according to my apprehension of their obvious meaning, and shall then state a very learned and interesting controversy concerning them, with the principal arguments on each side, as far as they tend to elucidate the question before us.

"Some contracts, fays the great writer on Sabinus,

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"make the party responsible for DECEIT ONLY;

fome, for both DECEIT AND NEGLECT. No
thing more than responsibility for DECEIT is

demanded in DEPOSITS and POSSESSION AT

WILL; both DECEIT AND NEGLECT are inbibited in COMMISSIONS, LENDING FOR

USE, CUSTODY AFTER SALE, TAKING IN

PLEDGE, HIRING; also in PORTIONS, GUAR
DIANSHIPS, VOLUNTARY WORK: (among

these some require even more than ordinary

DILIGENCE). PARTNERSHIP and UNDI
vided property make the partner and joint
proprietor answerable for both DECEIT AND

megligence*."

"In contracts, fays the fame author in his other work, we are fometimes responsible for DECEIT ALONE; sometimes, for NEGLECT ALSO; for DECEIT ONLY in DEPOSITS; because, since NO BENEFIT accrues to the degositary, he can justly be answerable for no more than DECEIT; but, if a REWARD hapmen to be given, then a responsibility for NEGLECT ALSO is required; or, if it be agreed

^{*} Contractûs quidam dolum malum duntaxat recipiunt; quidam, et dolum et culpam. Dolum tantûm depositum et precarium; dolum et culpam, mandatum, commodatum, venditum, pignori acceptum, locatum; item dotisdatio, tutelæ, negotia gesta: (in his quidam et diligentiam). Societas et rerum communio et dolum et culpam recipit. D. 50. 17. 23.

"at the time of the contract, that the depositary shall answer both for NEGLECT and for Accimal answer both for NEGLECT and for Accimination." Dent: but, where A benefit accrues to Both parties, as in Keeping A thing sold, as in hiring, as in Portions, as in Pledges, as in Partnership, both Decident And Neglect make the party liable. Lending for use, indeed, is for the most part beneficial to the Borrower only; and, for this reason, the better opinion is that of Q. Mucius, who thought, that he should be responsible not only for Neglect, but even for the omission of more than ordinary diligence."

One would fcarce have believed it possible, that there could have been two opinions on laws so perspicuous and precise, composed by the same writer, who was indubitably the best expositor

* In contractibus interdum bolum solum, interdum et culpam, præstamus; dolum in deposito; nam, quia nulla utilitas ejus versatur, apud quem deponitur, merito dolus præstatur solus; nisi sortè et merces accessit, tunc enim, ut est et constitutum, etiam culpa exhibetur; aut, si hoc ab initio convenit, ut et culpam et periculum præstet is, penes quem deponitur: sed, ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate, et dolus et culpa præstatur. Commodatum autem plerumque solam utilitatem continet ejus, cui commodatur; et ideò verior est Q. Much sententia existimantis et culpam præstandam et diligentam. D. 13. 6. 5. 2.

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of his own doctrine, and apparently written in illustration of each other; the first comprising the rule, and the fecond containing the reason of it: yet the fingle passage extracted from the book on SABINUS has had no fewer than twelve particular commentaries in Latin*, one or two in Greek+, and fome in the modern languages of EUROPE, besides the general expositions of that important part of the digest, in which it is preferved. Most of these I have perused with more admiration of human fagacity and industry than either folid instruction or rational entertainment: for these authors, like the generality of commentators, treat one another very roughly on very little provocation, and have the art rather of clouding texts in themselves clear, than of elucidating passages, which have any obscurity in the words or the sense of them. CAMPANAS, indeed, who was both a lawyer and a poet, has turned the first law of Ulpian into Latin hexameters; and his authority, both in profe and verse, confirms the interpretation, which I have just given.

The chief causes of all this perplexity have been, first, the vague and indistinct manner in which the old *Roman* lawyers, even the most

^{*} Bocerus, Campanus, D'avezan, Del Rio, Le Conte, Rittershusius, Giphanius, J. Godefroi, and others.

⁺ The scholium on *Harmenopulus*, 1. 6. tit. de Reg. Jur. 15. may be considered as a commentary on this law.

eminent, have written on the subject; secondly, the loose and equivocal sense of the words disciplential and culpa; lastly and principally, the darkness of the parenthetical clause in his Quidam et discentiam, which has produced more doubt, as to its true reading and signification, than any sentence of equal length in any author *Greek* or *Latin*. Minute as the question concerning this clause may seem, and dry as it certainly is, a short examination of it appears absolutely necessary.

The vulgate editions of the pandects, and the manuscripts, from which they were printed, exhibit the reading above fet forth; and it has accordingly been adopted by CUJAS, P. FABER, LE CONTE, DONELLUS, and most others, as giving a fense both perspicuous in itself and confiftent with the fecond law; but the FLORENTINE copy has quidem, and the copies, from which the Basilica were translated three centuries after JUSTINIAN, appear to have contained the same word, fince the Greeks have rendered it by a particle of fimilar import. This variation in a fingle letter makes a total alteration in the whole doctrine of ULPIAN; for, if it be agreed, that diligentia means, by a figure of speech, a more than ordinary degree of diligence, the common reading will imply, conformably with the fecond law before cited, that " SOME of the pre-

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"ceding contracts demand that higher degree;" but the Florentine reading will denote, in contradiction to it, that "ALL of them require more "than ordinary exertions."

It is by no means my defign to depreciate the authority of the venerable manuscript preserved at Florence; for, although few civilians, I believe, agree with POLITIAN, in supposing it to be one of the originals, which were fent by Justinian himself to the principal towns of Italy*, yet it may possibly be the very book, which the Emperor LOTHARIUS II. is faid to have found at Amalfi about the year 1130, and gave to the citizens of PISA, from whom it was taken, near three hundred years after, by the Florentines, and has been kept by them with fuperstitious reverence †: be that as it may, the copy deserves the highest respect; but, if any proof be requisite, that it is no faultless transcript, we may observe, that, in the very law before us, accedunt is erroneously written for accidunt; and the whole phrase, indeed, in which that word occurs, is different from the copy used by the Greek interpreters, and conveys a meaning, as Bocerus and others have remarked, not supportable by any principle or analogy.

^{*} Epist. x. 4. Miscell. cap. 41. See Gravina, lib. i. § 141.

⁺ Taurelli, Præf. ad Pand. Florent.

This, too, is indisputably clear; that the fentence in his QUIDEM et diligentiam, is ungrammatical, and cannot be conftrued according to the interpretation, which fome contend for. What verb is understood? Recipiunt. What noun? Contractús. What then becomes of the words in bis, namely contractibus, unless in fignify among? And, in that case, the difference between QUI-DEM and QUIDAM vanishes; for the clause may ftill import, that " AMONG the preceding con-" tracts (that is, in some of them), more than " usual diligence is exacted:" in this sense the Greek preposition seems to have been taken by the scholiast on HARMENOPULUS; and it may here be mentioned, that diligentia, in the nominative, appears in some old copies, as the Greeks have rendered it; but Accursius, DEL Rio. and a few others, confider the word as implying no more than diligence in general, and diftinguish it into various degrees applicable to the feveral contracts, which ULPIAN enumerates. We may add, that one or two interpreters thus explain the whole fentence, " in his contractibus qui-" dam jurisconsulti et diligentiam requirunt," but this interpretation, if it could be admitted, would entirely destroy the authority of the clause, and imply, that Ulpian was of a different opinion. As to the last conjecture, that only certain cases and circumstances are meaned by the word QUIDAM, it scarce de-

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ferves to be repeated. On the whole, I ftrongly incline to prefer the vulgate reading, especially as it is not conjectural, but has the authority of manuscripts to support it; and the mistake of a letter might easily have been made by a transcriber, whom the prefaces, the epigram prefixed, and other circumstances, prove to have been, as Taurelli himself admits, a Greek .-Whatever, in fhort, be the genuine words of this much-controverted clause, I am persuaded, that it ought by no means to be ftrained into an inconfistency with the fecond law; and this has been the opinion of most foreign jurists from Azo and ALCIAT down to HEINECCIUS and HUBER; who, let their diffension be, on other points, ever so great, think alike in distinguishing three degrees of neglect, which we may term grofs, ordinary, and flight, and in demanding responfibility for those degrees according to the rule before expounded.

The law then on this head, which prevailed in the ancient Roman empire, and still prevails in Germany, Spain, France, Italy, Holland, constituting, as it were, a part of the law of nations, is in substance what follows.

Gross neglect, lata culpa, or, as the Roman lawyers most accurately call it, dolo proxima, is in practice considered as equivalent to Dolus, or FRAUD, itself; and consists, according to the best interpreters, in the omission of that care,

which even inattentive and thoughtless men never fail to take of their own property: this fault they justly hold a violation of good faith.

Ordinary neglect, levis culpa, is the want of that diligence, which the generality of mankind use in their own concerns; that is, of ordinary care.

Slight neglect, levissima culpa, is the omission of that care, which very attentive and vigilant persons take of their own goods, or, in other words, of very exact diligence.

Now, in order to ascertain the degree of neglect, for which a man, who has in his possession the goods of another, is made responsible by his contract, either express or implied, civilians establish three principles, which they deduce from the law of Ulpian on the Edict; and here it may be observed, that they frequently distinguish this law by the name of Siut certo, and the other by that of Contractus*; as many poems and histories in ancient languages are denominated from their initial words.

First: In contracts, which are beneficial folely to the owner of the property holden by another,

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^{*} Or 1. 5. § 2. ff. Commod. and 1. 23. ff. de reg. jur. Infread of ff, which is a barbarous corruption of the initial letter of πανδέκλαι, many write D, for Digeft, with more clearness and propriety.

no more is demanded of the holder than good faith, and he is consequently responsible for nothing less than gross neglect: this, therefore, is the general rule in DEPOSITS; but, in regard to COMMISSIONS, or, as foreigners call them, MANDATES, and the implied contract negotiorum gestorum, a certain care is requisite from the nature of the thing; and, as good faith itself demands, that such care be proportioned to the exigence of each particular case, the law presumes, that the mandatary or commissioner, and, by parity of reason, the negotiorum gestor, engaged at the time of contracting to use a degree of diligence adequate to the performance of the work undertaken*.

Secondly: In contracts reciprocally beneficial to both parties, as in those of sale, hiring, pledging, partnership, and the contract implied in Joint-property, such care is exacted, as every prudent man commonly takes of bis own goods; and, by consequence, the vendor, the hirer, the taker in pledge, the partner, and the co-proprietor, are answerable for ordinary neglect.

Thirdly: In contracts, from which a benefit accrues only to him, who has the goods in his

^{*} Spondet diligentiam, fay the Roman lawyers, gerendo nego-

eustody, as in that of LENDING FOR USE, an extraordinary degree of care is demanded; and the borrower is, therefore, responsible for flight negligence.

This had been the learning generally, and almost unanimously, received and taught by the doctors of Roman law; and it is very remarkable, that even ANTOINE FAVRE, or Faber, who was famed for innovation and paradox, who published two ample volumes De Erroribus Interpretum, and whom GRAVINA justly calls the boldest of expositors and the keenest adversary of the practifers*, discovered no error in the common interpretation of two celebrated laws. which have so direct and so powerful an influence over focial life, and which he must repeatedly have confidered: but the younger Godefroi of Geneva, a lawyer confessedly of eminent learning, who died about the middle of the last century, left behind him a regular commentary on the law Contractus, in which he boldly combats the fentiments of all his predecessors, and even of the ancient Romans, and endeavours to support a new system of his own.

He adopts, in the first place, the Florentine reading, of which the student, I hope, has

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^{*} Orig. Jur. Civ. lib. i. § 183.

formed by this time a decided opinion from a preceding page of this essay.

He censures the rule comprised in the law Si ut certo as weak and fallacious, yet admits, that the rule, which He condemns, had the approbation and support of Modestinus, of Paulus, of Africanus, of Gaius, and of the great Papinian himfelf; nor does he fatisfactorily prove the fallaciousness, to which he objects, unless every rule be fallacious, to which there are fome exceptions. He understands by DILIGENTIA that care, which a very attentive and vigilant man takes of his own property; and he demands this care in all the eight contracts, which immediately precede the disputed clause: in the two, which follow it, he requires no more than ordinary diligence. He admits, however, the three degrees of neglect above stated, and uses the common epithets levis and levishma; but, in order to reconcile his system with many laws, which evidently oppose it, he ascribes to the old lawyers the wildest mutability of opinion, and is even forced to contend, that ULPIAN himself must bave changed his mind.

Since his work was not published, I believe, in his life-time, there may be reason to suspect, that he had not completely settled his own mind; and he concludes, indeed, with referring the decision of every case on this head to that most

dangerous and most tremendous power, the difcretion of the judge*.

The triple division of neglects had also been highly cenfured by some lawyers of reputation. Zasius had very justly remarked, that neglects differed in degree, but not in species; adding, " tnat he had no objection to use the words " levis and levissima, merely as terms of practice " adopted in courts, for the more easy distinction "between the different degrees of care ex-" acted in the performance of different con-"tracts +:" but Donellus, in opposition to his master Duaren, insisted that levis and levissima differed in sound only, not in sense; and attempted to prove his affertion triumphantly by a regular fyllogism; the minor proposition of which is raifed on the figurative and inaccurate manner, in which positives are often used for fuperlatives, and converfely, even by the best of the old Roman lawyers. True it is, that, in the law Contractus, the division appears to be

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^{* &}quot;Ego certè hac in re censentibus accedo, vix quidquam se generaliùs definiri posse; remque hanc ad arbitrium judicis, prout res est, referendam." p. 141.

[†] ZAS. Singul. Resp. lib. i. cap. 2.

^{‡ &}quot;Quorum definitiones eædem funt, ea inter se sunt eadem; levis autem culpæ et levissimæ una et eadem desimitio est; utraque igitur culpa eadem." Comm. Jur. Civ. lib. xvi. cap. 7.

in species, when the first means actual fraud and malice, but in degree merely, when it denotes no more than gross neglect; and, in either case, the second branch, being capable of more and less, may be subdivided into ordinary and slight; a subdivision, which the law Si ut certo obviously requires: and thus are both laws perfectly reconciled.

We may apply the same reasoning, changing what should be changed, to the triple division of diligence; for, when good faith is confidered as implying at least the exertion of flight attention, the other branch, Care, is subdivisible into ordinary and extraordinary; which brings us back to the number of degrees already established both by the analysis and by authority.

Nevertheless, a system, in one part entirely new, was broached in the present century by an advocate in the parliament of Paris, who may, probably, be now living, and, possibly, in that professional station, to which his learning and acuteness justly entitle him. I speak of M. Le Brun, who published, not many years ago, an Essay on Responsibility for Neglect*, which he

^{*} Essai sur la Prestation des Fautes, à Paris, chez Saugrain, 1764.

had nearly finished, before he had seen the commentary of *Godefroi*, and, in all probability, without ever being acquainted with the opinion of *Donellus*.

This author sharply reproves the triple divifion of neglects, and feems to difregard the rule concerning a benefit arifing to both, or to one, of the contracting parties; yet he charges Godefroi with a want of due clearness in his ideas, and with a palpable mifinterpretation of feveral laws. He reads in his quidem et diligentiam; and that with an air of triumph; infinuating, that quidam was only an artful conjecture of Cujas and Le Conte, for the purpose of establishing their system; and he supports his own reading by the authority of the BASILICA; an autho-11ty, which, on another occasion, he depreciates. He derides the absurdity of permitting negligence in any contract, and urges, that such permission, as he calls it, is against express law: " now, " fays he, where a contract is beneficial to both " parties, the doctors permit flight negligence, " which, how flight soever, is still negligence, "and ought always to be inhibited." warmly contends, that the ROMAN laws, properly understood, admit only two degrees of diligence; one, measured by that, which a provident and attentive father of a family uses in his own concerns; another, by that care, which

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the individual party, of whom it is required, is accustomed to take of his own possessions; and he, very ingeniously, substitutes a new rule in the place of that, which he rejects; namely, that, when the things in question are the SOLE property of the person, to whom they must be restored, the holder of them is obliged to keep them with the first degree of diligence; whence he decides, that a borrower and a birer are responsible for precisely the fame neglect; that a vendor, who retains for a time the custody of the goods fold, is under the fame obligation, in respect of care, with a man, who undertakes to manage the affairs of another, either without his request, as a negotiorum gestor, or with it, as a mandatary: "but, fays he, when "the things are the JOINT property of the parties " contracting, no higher diligence can be required "than the fecond degree, or that, which the " acting party commonly uses in his own affairs; " and it is fufficient, if he keep them, as he keeps " bis own." This he conceives to be the diftinction between the eight contracts, which precede, and the two, which follow, the words in bis quidem et diligentiam.

Throughout his work he displays no small fagacity and erudition, but speaks with too much considence of his own decisions, and with too much asperity or contempt of all other interpreters from Barrolus to Vinnius.

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At the time when this author wrote, the learned M. POTHIER was composing some of his admirable treatises on all the different species of express, or implied, contracts; and here I feize with pleasure an opportunity of recommending those treatises to the English lawyer, exhorting him to read them again and again; for, if his great master LITTLETON has given him, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will furely be delighted with works, in which all those advantages are combined, and the greatest portion of which is law at Westminster as well as at Orleans*: for my own part, I am so charmed with them, that, if my undissembled fondness for the study of jurisprudence were never to produce any greater benefit to the publick, than barely the introduction of POTHIER to the acquaintance of my countrymen, I should think that I had in some measure discharged the debt, which every man, according to lord Coke, owes to his profession.

To this venerable professor and judge, for he had sustained both characters with deserved applause, LE BRUN sent a copy of his little work;

^{*} Oeuvres de M. Pothier, à Paris, chez Debure: 28 volumes in duodecimo, or 6 in quarto. The illustrious author died in 1772.

and M. Pothier honoured it with a short, but complete, answer in the form of a General Obfervation on his Treatifes*; declaring, at the fame time, that be would not enter into a literary contest, and apologizing for his fixed adherence to the ancient fystem, which he politely ascribes to the natural bias of an old man in favour of opinions formerly imbibed. This is the fubstance of his answer: "that he can discover no kind of ab-" furdity in the usual division of neglect and di-" ligence, nor in the rule, by which different de-" grees of them are applied to different con-"tracts; that to speak with strict propriety, " negligence is not permitted in any contract, " but a less rigorous construction prevails in some "than in others; that a birer, for instance, is " not confidered as negligent, when he takes the " fame care of the goods hired, which the ge-" nerality of mankind take of their own; that " the letter to bire, who has his reward, must be " prefumed to have demanded at first no higher " degree of diligence, and cannot justly complain of that mattention, which in another case might " have been culpable; for a lender, who has no "reward, may fairly exact from the borrower "that extraordinary degree of care, which a very

^{*} It is printed apart, in fourteen pages, at the end of his treatise on the Marriage-contract.

" attentive person of his age and quality would certainly have taken; that the diligence, which " the Individual party commonly uses in his " own affairs, cannot properly be the object of " judicial inquiry; for every truftee, administra-" tor, partner, or co-proprietor, must be pre-" fumed by the court, auditors, or commissioners, " before whom an account is taken, or a distri-" bution or partition made, to use in their own " concerns fuch diligence, as is commonly used 66 by all prudent men; that it is a violation of " good faith for any man to take less care of an-" other's property, which has been intrusted to him, " than of bis own; that, confequently, the author " of the new fystem demands no more of a " partner or a joint-owner than of a depositary, "who is bound to keep the goods deposited as " be keeps his own; which is directly repugnant " to the indisputable and undisputed sense of the " law Contractus."

I cannot learn whether M. LE BRUN ever published a reply, but am inclined to believe that his fystem has gained very little ground in France, and that the old interpretation continues universally admitted on the continent both by theorists and practisers.

Nothing material can be added to POTHIER's argument, which, in my humble opinion, is unanswerable; but it may not be wholly useless to

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fet down a few general remarks on the controversy: particular observations might be multiplied without end.

The only essential difference between the fystems of Godefroi and Le Brun relates to the two contracts, which follow the much-disputed clause; for the Swiss lawyer makes the partner and co-proprietor answerable for ordinary neglect, and the French advocate demands no more from them than common bonesty: now, in this respect, the error of the second system has been proved to demonstration; and the author of it himself confesses ingenuously, that the other part of it fails in the article of Marriage-portions*.

In regard to the division of neglect and care into three degrees or two, the dispute appears to be merely verbal; yet, even on this head, LE BRUN seems to be self-confuted: he begins with engaging to prove "that only two degrees of "fault are distinguished by the laws of Rome," and ends with drawing a conclusion, that they acknowledge but one degree: now, though this might be only a slip, yet the whole tenor of his book establishes two modes of diligence, the omissions of which are as many neglects; exclusively of gross neglect, which he likewise admits, for the culpa levissima only is that, which he repu-

^{*} See p. 71. note; and p. 126.

diates. It is true, that he gives no epithet or name to the omission of his *second* mode of care; and, had he searched for an epithet, he could have found no other than *gros*; which would have demonstrated the weakness of his whole system*.

The disquisition amounts, in fact, to this: from the barrenness or poverty, as Lucretius calls it, of the Latin language, the fingle word CULPA includes, as a generick term, various degrees or shades of fault, which are sometimes diffinguished by epithets, and sometimes left without any distinction; but the Greek, which is rich and flexible, has a term expressive of almost every shade, and the translators of the law Contractus actually use the words jatumia and α'μέλεια, which are by no means fynonymous, the former implying a certain eafiness of mind or remissiness of attention, while the second imports a higher and more culpable degree of negligence†. This observation, indeed, seems to fayour the fystem of Godefroi; but I lay no great

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^{*} See pages 32. 73. 74. 149.

[†] Basilica, 2, 3, 23. See Demosth. 3 Phil. Reiske's edit. I. 112. 3. For levissima culpa, which occurs but once in the whole body of Roman law, ἐράθυμία seems the proper word in Greek; and it is actually so used in the Basilica, 60. 3. 5. where mention is made of the Aquilian law, in quâ, says ULPIAN, et levissima culpa venit. D. 9. 2. 44.

ftress on the mere words of the translation, as I cannot persuade myself, that the Greek jurists under Basilius and Leo were perfectly acquainted with the niceties and genuine purity of their language; and there are invincible reasons, as, I hope, it has been proved, for rejecting all systems but that, which Pothier has recommended and illustrated.

I come now to the laws of our own country, in which the same distinctions and the same rules, notwithstanding a few clashing authorities, will be found to prevail; and here I might proceed chronologically from the oldest Year-book or Treatife to the latest adjudged Case; but, as there would be a most unpleasing dryness in that method, I think it better to examine separately every diffinct species of bailment, observing at the same time, under each head, a kind of historical order. It must have occurred to the reader, that I might easily have taken a wider field, and have extended my inquiry to every possible case, in which a man possesses for a time the goods of another; but I chose to confine myself within certain limits, lest, by grasping at too vast a subject, I should at last be compelled, as it frequently happens, by accident or want of leifure, to leave the whole work unfinished: it will be sufficient to remark. that the rules are in general the same, by whatever means the goods are legally in the hands of

the possession, whether by delivery from the owner, which is a proper bailment, or from any other person, by finding*, or in consequence of some distinct contract.

Sir John Holt, whom every Englishman should mention with respect, and from whom no English lawyer should venture to dissent without extreme dissidence, has taken a comprehensive view of this whole subject in his judgment on a celebrated case, which shall soon be cited at length; but, highly as I venerate his deep learning and singular sagacity, I shall find myself constrained, in some few instances, to differ from him, and shall be presumptuous enough to offer a correction or two in part of the doctrine, which he propounds in the course of his argument.

His division of bailments into fix forts appears, in the first place, a little inaccurate; for, in truth, his fifth fort is no more than a branch of his third, and he might, with equal reason, have added a feventh, since the fifth is capable of another subdivision. I acknowledge, therefore, but five species of bailment; which I shall now enumerate and define, with all the

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^{*} Doct. and Stud. dial. 2. ch. 38. Lord Raym. 909. 917. See Ow. 141. I Leon. 224. I Cro. 219. Mulgrave and Ogden.

⁺ Lord Raym. 912.

Latin names, one or two of which lord HOLT has omitted. I. DEPOSITUM, which is a naked bailment, without reward, of goods to be kept for the bailor. 2. MANDATUM, or commission; when the mandatary undertakes, without recoinpence, to do some act about the things hailed, or fimply to carry them; and hence Sir HENRY FINCH divides bailment into two forts, to keep. and to employ*. 3. COMMODATUM, or loan for use; when goods are bailed, without pay, to be used for a certain time by the bailee. PIGNORI ACCEPTUM; when a thing is bailed by a debtor to his creditor in pledge, or as a fecurity for the debt. 5. LOCATUM, or biring, which is always for a reward; and this bailment is either, 1. locatio rei, by which the hirer gains the temporary use of the thing; or, 2. locatio operis faciendi, when work and labour, or care and pains, are to be performed or bestowed on the thing delivered: or, 3. locatio operis mercium vehendarum, when goods are bailed for the purpose of being carried from place to place, either to a publick carrier, or to a private person.

I. The most ancient case, that I can find in our books, on the doctrine of Deposits (there were others, indeed, a few years earlier, which turned on points of pleading), was adjudged in

^{*} Law, b. 2. ch. 18.

the eighth of Edward II. and is abridged by FITZHERBERT*. It may be called Bonion's case, from the name of the plaintiff, and was, in fubstance, this: An action of detinue was brought for feals, plate, and jewels, and the defendant pleaded, "that the plaintiff had bailed " to him a cheft to be kept, which cheft was " locked; that the bailor himself took away the " key, without informing the bailee of the contents; " that robbers came in the NIGHT, broke open " the defendant's chamber, and carried off the " chest into the fields, where they forced the " lock, and took out the contents; that the defendant was robbed at the same time of his own " goods." The plaintiff replied, " that the " jewels were delivered, in a chest not locked, to " be restored at the pleasure of the bailor," and on this, it is faid, iffue was joined.

Upon this case lord Holt observes, "that "he cannot see, why the bailee should not be "charged with goods in a chest as well as with "goods out of a chest; for," says he, "the bailee has as little power over them, as to any benefit that he might have from them, and as "great power to defend them in one case as "in the other." The very learned judge was

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^{*} Mayn. Edward II. 275. Fitz. Abr. tit. Detinue, 59. † Lord Raym. 914.

diffatisfied, we fee, with Sir EDWARD COKE's reason, "that, when the jewels were locked up " in a chest, the bailee was not, in fact, trusted "with them*." Now there was a diversity of opinion, upon this very point, among the greatest lawyers of Rome; for "it was a question, " whether, if a box fealed up had been deposited, "the box only should be demanded in the ac-"tion, or the clothes, which it contained, should " also be specified; and TREBATIUS insists, that " the box only, not the particular contents of it, " must be sued for; unless the things were pre-" viously shewn, and then deposited: but LABEO " afferts, that he, who deposits the box, deposits the contents of it; and ought, therefore, to demand " the clothes themselves. What then, if the depo-" fitary was ignorant of the contents? It feems to " make no great difference, fince he took the "charge upon himfelf; and I am of opinion, " fays ULPIAN, that, although the box was " fealed up, yet an action may be brought for "what it contained †." This relates chiefly to the form of the libel; but, furely, cases may be put, in which the difference may be very material as to the defence. Diamonds, gold, and precious trinkets, ought, from their nature, to be kept with peculiar care under lock and key: it

^{* 4} Rep. 84.

would, therefore, be gross negligence in a depofitary to leave fuch a deposit in an open antichamber, and ordinary neglect, at least, to let them remain on his table, where they might possibly tempt his fervants; but no man can proportion his care to the nature of things, without knowing them: perhaps, therefore, it would be no more than flight neglect, to leave out of a drawer a box or casket, which was neither known. nor could justly be suspected, to contain diamonds: and DOMAT, who prefers the opinion of TRE-BATIUS, decides, "that, in fuch a case, the de-" positary would only be obliged to restore the " cafket, as it was delivered, without being re-" sponsible for the contents of it." I confess, however, that, anxiously as I wish on all occafions to fee authorities respected, and judgment holden facred, Bonion's case appears to me wholly incomprehensible; for the defendant, instead of having been grossly negligent (which alone could have exposed him to an action). feems to have used at least ordinary diligence; and, after all, the loss was occasioned by a burglary, for which no bailee can be responsible without a very special undertaking. The plea, therefore, in this case was good, and the replication, idle; nor could I ever help fuspecting a mistake in the last words alii quòd non; although RICHARD DE WINCHEDON, or whoever was the

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distinction, that, "if jewels be bailed to me, and "I put them into a casket, and thieves rob me of "them in the night-time, I am answerable; not, "if they be delivered to me in a chest sealed "up;" which could never have been law, for the next oldest case, in the book of Assis, contains the opinion of chief justice Thorpe, that "a general bailee to keep is not responsible, "if the goods be stolen, without his gross ne"glect*;" and it appears, indeed, from Fitz-Herbert, that the party was driven to this issue, "whether the goods were taken away by "robbers."

By the Mosaick institutions, "if a man deli"vered to his neighbour Money or Stuff to
"keep, and it was stolen out of his house, and the
"thief could not be found, the master of the
"house was to be brought before the judge, and
"to be discharged, if he could swear, that he
"had not put his band unto his neighbour's
"goods;" or, as the Roman author of the Lex
Dei translates it, Nihil se nequiter gessife; but
a distinction seems to have been made between a

^{* 29.} Aff. 28. Bro. Abr. tit. Bailment, pl. 7.

⁺ Exod. xxii. 7, 8.

[‡] Lib. 10. De Deposito. This book is printed in the same volume with the Theodosian Code, Paris, 1586.

flealing by day and a flealing by night*; and " if CATTLE were bailed and stolen (by day, I " prefume), the person, who had the care of "them, was bound to make restitution to the "owner+;" for which the reason seems to be, that, when cattle are delivered to be kept, the bailee is rather a mandatary than a depositary, and is, confequently, obliged to use a degree of diligence adequate to the charge: now sheep can hardly be stolen in the day-time without some neglect of the shepherd; and we find that, when IACOB, who was, for a long time at least, a bailee of a different fort, as he had a reward, lost any of the beafts intrusted to his care, LABAN made him answer for them "whether stolen by "day or stolen by night !."

Notwithstanding the high antiquity, as well as the manifest good sense, of the rule, a contrary doctrine was advanced by Sir EDWARD COKE, in his Reports, and afterwards deliberately inferted in his Commentary on LITTLETON, the great refult of all his experience and learning; namely, "that a depositary is responsible, if the " goods be stolen from him, unless he accept "them specially to keep as his own," whence he advises all depositaries to make such a spe-

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^{*} Gen. xxxi. 39. + Exod. xxii. 12.

[‡] Gen. xxxi. 39.

cial acceptance*. This opinion, so repugnant to natural reason and the laws of all other nations, he grounded partly on some broken cases in the Year-books, mere conversations on the bench, or loose arguments at the bar; and partly on Southcote's case, which he has reported, and which by no means warrants his deduction from it. As I humbly conceive that case to be law, though the doctrine of the learned reporter cannot in all points be maintained, I shall offer a few remarks on the pleadings in the cause, and the judgement given on them.

SOUTHCOTE declared in detinue, that he had delivered goods to Bennet, to be by him safely kept: the defendant confessed such delivery, but pleaded in bar, that a certain person stole them out of his possession; the plaintist replied, protesting that he had not been robbed, that the person named in the plea was a servant of the desendant, and demanded judgement; which, on a general demurrer to the replication, he obtained. "The reason of the judgement, says lord "Coke, was, because the plaintist had delivered the goods to be safely kept, and the defend-" ant had taken the charge of them upon him- self, by accepting them on such a delivery." Had the reporter stopped here, I do not see

^{* 4} Rep. 83. b. 1 Inst. 89. a. b.

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what possible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit, which has occasioned so many reflections on the case itself; namely, "that to KEEP and to keep SAFELY are one and the same thing;" a notion which was denied to be law by the whole court in the time of chief justice Holt*.

It is far from my intent to speak in derogation of the great commentator on LITTLETON; since it may truly be afferted of him, as QUINTILIAN said of CICERO, that an admiration of bis works is a sure mark of some proficiency in the study of the law; but it must be allowed, that his profuse learning often ran wild, and that he has injured many a good case by the vanity of thinking to improve them.

The pleader, who drew the replication in SOUTHCOTE'S case, must have entertained an idea, that the blame was greater, if a servant of the depositary stole the goods, than if a mere stranger had pursoined them; since the defendant ought to have been more on his guard against a person, who had so many opportunities of stealing; and it was his own fault, if he gave those opportunities to a man, of whose honesty he was not morally certain: the court, we find,

^{*} Lord Raym. 911. margin.

rejected this distinction, and also held the replication informal, but agreed, that no advantage could betaken on a general demurrer of fuch informality, and gave judgement on the fubstantial badness of the plea*. If the plaintiff, inflead of replying, had demurred to the plea in bar, he might have infifted in argument, with reason and law on his side, "that, although "a general bailee to keep be responsible for "GROSS neglect only, yet BENNET had, by a 66 special acceptance, made himself answerable "for ordinary neglect at least; that it was " ordinary neglect, to let the goods be ftolen out 66 of his possession, and he had not averred, that "they were stolen without his default; that he " ought to have put them into a safe place, ac-" cording to his undertaking, and have kept "the key of it himself; that the special bailee " was reduced to the class of a conductor operis, " or a workman for bire; and that a tailor, to "whom his employer has delivered lace for a " fuit of clothes, is bound, if the lace be stolen, "to restore the value of it †." This reasoning

^{* 1} Cro. 815.

^{+ &}quot;Alia est furti ratio; id enim non casui, sed levi culpæ, fermè ascribitur." Gothofr. Comm. in L. Contractus, p. 145. See D. 17. 2. 52. 3. where says the annotator, "Adversus latrones parum prodest custodia; adversus furem prodeste potest, si quis advigilet." See also Poth. Contrat de Louage, n. 429. and Contrat de Pret à usuge, n. 53. So, by justice Cot-

would not have been just, if the bailee had pleaded, as in Bonion's case, that he had been robbed by violence, for no degree of care can in general prevent an open robbery: impetús prædonum, says Ulpian, à nullo præstantur.

Mr. Justice Powell, speaking of South-COTE's case, which he denies to be law, admits, that, "if a man does undertake Specially to keep "goods safely, that is a warranty, and will " oblige the bailee to keep them fafely against " perils, where be has a remedy over, but not " against those where he has no remedy over "." One is unwilling to suppose, that this learned judge had not read lord Coke's report with attention; yet the case, which he puts, is precisely that which he opposes, for Benner did undertake "to keep the goods safely;" and, with fubmission, the degree of care demanded, not the remedy over, is the true measure of the obligation; for the bailee might have his appeal of robbery, yet he is not bound to keep the goods against robbers without a most express agreement+. This, I apprehend, is all that was meaned by St. GERMAN, when he fays, " that,

tesmore, "Si jeo grante byens a un home a garder a mon oeps, "s si les byens per son mesgarde sont embles, il sera charge a moy de mesmes les byens, mez s'il soit robbe de mesmes les byens, "il est excusable per le ley." 10 Hen. VI. 21.

^{*} Ld. Raym. 912. † 2 Sho. pl. 166.

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"if a man bave nothing for keeping the goods bailed, and promise, at the time of the delivery, to restore them safe at his peril, he is not resistant from the passage, but the rule extracted from this passage, that a special active ceptance to keep safely will not charge the bailee against the acts of wrongdoers; to which purport Hobart also and Croke are cited, is too general, and must be confined to acts of violence.

I cannot leave this point, without remarking, that a tenant at will, whose interest, when he has it rentfree, the Romans called PRECARIUM, stands in a fituation exactly parallel to that of a depofitary; for, although the contract be for his benefit, and, in some instances, for bis benefit only, yet he has an interest in the land till the will is determined, "and, our law adds, it is the folly of " the lesior, if he do not restrain him by a special " condition:" thence it was adjudged, in the Countess of Shrewsbury's case, "that an action " will not lie againt a tenant at will generally, if "the house be burned through his neglect;" but, fays justice Powell, " had the action been " founded on a special undertaking, as that, in " confideration that the leffor would let him live

^{*} Doct. and Stud. dial. 2. chap. 38.

⁺ Com. 135. Ld. Raym. 915.

^{1 5} Rep. 13 b.

"in the house, he would deliver it up in as good "repair as it then was in, such an action would "have been maintainable.*"

It being then established, that a bailee of the first fort is answerable only for a fraud, or for gross neglect, which is considered as evidence of it, and not for fuch ordinary inattentions as may be compatible with good faith, if the depolitary be himself a careless and inattentive man; a question may arise, whether, if proof be given, that he is, in truth, very thoughtful and vigilant in bis own concerns, he is not bound to restitution, if the deposit be lost through his neglect, either ordinary or flight; and it feems eafy to support the affirmative; fince in this case the measure of diligence is that, which the bailee uses in his own affairs. It must however be confessed, that the character of the individual depositary can hardly be an object of judicial discussion: if he be flightly or even ordinarily negligent in keeping the goods deposited, the favourable presumption is, that he is equally neglectful of his own property; but this prefumption, like all others, may be repelled; and, if it be proved, for instance, that, his house being on fire, he faved his own goods, and, having time and power to fave also those deposited, suffered them to be burned, he

* Ld. Raym. 911.

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shall restore the worth of them to the owner*. If, indeed, he have time to fave only one of two chefts, and one be a deposit, the other his own property, he may justly prefer his own; unless that contain things of small comparative value. and the other be full of much more precious goods, as fine linen or filks; in which case he ought to fave the more valuable cheft, and has a right to claim indemnification from the depositor for the loss of his own. Still farther; if he commit even a gross neglect in regard to his own goods as well as those bailed, by which both are lost or damaged, he cannot be faid to have violated good faith, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person+.

To this principle, that a depositary is answerable only for gross negligence, there are some exceptions.

First, as in Southcote's case, where the bailee, by a *special* agreement, has engaged to answer for less: "Si quid nominatim convenit," says the *Roman* lawyer, "vel plus vel minus in singulis "contractibus, hoc servabitur quod initiò con-"venit; legem enim contractui dedit;" but the

^{*} Ротн. Contrat de Dépôt, n. 29. Stiernh. de Jure Sueon. 1. 2. с. 5.

[†] Bract. 99. b. Justin. Inst. 1. 3. tit. 15.

¹ L. Contractus, 23. D. de reg. jur.

opinion of Celsus, that an agreement to dispense with deceit is void, as being contrary to good morals and decency, has the affent both of Ulpian and our English courts*.

Secondly; when a man fpontaneously and officiously proposes to keep the goods of another, be may prevent the owner from intrusting them with a person of more approved vigilance; for which reason be takes upon himself, according to Julian, the risk of the deposit, and becomes responsible at least for ordinary neglect, but not for mere casualties.

Where things are deposited through necessity on any sudden emergence, as a fire or a shipwreck, M. Le Brun insists, "that the depositary must "answer for less than gross neglect, how careless "foever he may be in his own affairs; since the "preceding remark, that a man, who reposes confidence in an improvident person, must impute any loss to his own folly, is inapplicable to a "case, where the deposit was not optional; and "the law ceases with the reason of it;" but that is not the only reason; and, though it is an additional missortune, for a man in extreme haste and deep distress to light upon a stupid or inat-

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^{*} Doct. and Stud. dial. 2. chap. 38.

[†] D. 16. 3\\\ 1. 35.

[†] De la Prestation des Fautes, p. 77.

tentive depositary, yet I can hardly persuade myfelf, that more than perfect good faith is demanded in this case, although a violation of that faith be certainly more criminal than in other cases, and was therefore punished at Rome by a forseiture of the double value of the goods deposited.

In these circumstances, however, a benevolent offer of keeping another's property for a time would not, I think, bring the case within Julian's rule before-mentioned, so as to make the person offering answerable for slight, or even ordinary, negligence; and my opinion is confirmed by the authority of Labeo, who requires no more than good faith of a negotiorum gestor, when "affectione coactus, ne bona mea distrahantur," negotiis se meis obtulerit."

Thirdly; when the bailee, improperly called a depositary, either directly demands and receives a reward for bis care, or takes the charge of goods in consequence of some lucrative contract, he becomes answerable for ordinary neglect; since, in truth, he is in both cases a conductor operis, and lets out his mental labour at a just price: thus, when clothes are left with a man, who is paid for the use of his bath, or a trunk with an innkeeper or his servants, or with a ferryman, the bailees are as much bound to indemnify the owners if the goods be lost or damaged through

their want of ordinary circumspection, as if they were to receive a stipulated recompense for their attention and pains; but of this more fully, when we come to the article of kiring.

Fourthly; when the bailee alone receives advantage from the deposit, as, if a thing be borrowed on a future event, and deposited with the intended borrower, until the event happens, because the owner, perhaps, is likely to be absent at the time, fuch a depositary must answer even for flight negligence; and this bailment, indeed, is rather a loan than a deposit, in whatever light it may be confidered by the parties. Suppose, for example, that Charles, intending to appear at a masked ball expected to be given on a future night, requests George to lend him a dress and jewels for that purpose, and that George, being obliged to go immediately into the country, defires Charles to keep the drefs till his return, and, if the ball be given in the mean time, to wear it; this feems to be a regular loan, although the original purpose of borrowing be future and contingent.

Since, therefore, the two last cases are not, in strict propriety, deposits, the exceptions to the general rule are reduced to two only; and the second of them, I conceive, will not be rejected by the English lawyer, although I recollect no de-

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cision or dictum exactly conformable to the opinion of Julian.

Clearly as the obligation to restore a deposit flows from the nature and definition of this contract, yet, in the reign of ELIZABETH, when it had been adjudged, consistently with common sense and common honesty, "that an action on "the case lay against a man, who had not per-"formed his promise of redelivering, or deliver-"ing over, things bailed to him," that judgement was reversed; and, in the fixth year of JAMES, judgement for the plaintiss was arrested in a case exactly similar*: it is no wonder, that the profession grumbled, as lord Holt says, at so absurd a reversal; which was itself most justly reversed a few years after, and the first decision solemnly established.

Among the other curious remains of Attick law, which philologers have collected, very little relates to the contracts, which are the subject of this essay; but I remember to have read of DE-MOSTHENES, that he was advocate for a person, with whom three men had deposited some valuable utensil, of which they were joint-owners; and the depositary had delivered it to one of them, of whose knavery he had no suspicion;

^{*} Yelv. 4. 50. 128.

^{+ 2} Cro. 667. Wheatly and Low.

upon which the other two brought an action, but were nonfuited on their own evidence, that there was a third bailor, whom they had not joined in the fuit; for, the truth not being proved, Demosthenes infifted, that his client could not legally reftore the deposit, unless all three proprietors were ready to receive it; and this doctrine was good at Rome as well as at Athens, when the thing deposited was in its nature incapable of partition: it is also law, I apprehend, in Westminster-hall*.

The obligation to return a deposit faithfully was, in very early times, holden facred by the Greeks, as we learn from the story of Glaucus, who, on consulting the oracle, received this answer "that it was criminal even to barbour a "thought of with-holding deposited goods from the owners, who claimed them;" and a fine application of this universal law is made by an Arabian poet contemporary with Justinian, who remarks, "that life and wealth are only "deposited with us by our creator, and, like all "other deposits, must in due time be restored."

II. Employment by COMMISSION was also known to our ancient lawyers; and BRACTON, the best writer of them all, expresses it by the Roman

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^{*} D. 16. 3. 1. 36. Bro. Abr. tit. Bailment, pl. 4. + Herod. VI. 86. Juv. Sat. XIII. 199.

word, Mandatum; now, as the very effence of this contract is the gratuitous performance of it by the bailee, and as the term commission is also pretty generally applied to bailees, who receive bire or compensation for their attention and trouble, I shall not scruple to adopt the word MANDATE as appropriated in a limited fense to the species of bailment now before us; nor will any confusion arise from the common acceptation of the word in the fense of a judicial command or precept, which is in truth only a fecondary and inaccurate usage of it. The great distinction then between one fort of mandate and a deposit is, that the former lies in fesance, and the latter, fimply in cuftody: whence, as we have already intimated, a difference often arifes between the degrees of care demanded in the one contract and in the other; for, the mandatary being confidered as having engaged himself, to use a degree of diligence and attention adequate to the performance of his undertaking, the omission of fuch diligence may be, according to the nature of the business, either ordinary, or flight, neglect; although a bailee of this species ought regularly to be answerable only for a violation of good faith. This is the common doctrine taken from the law of ULPIAN; but there feems, in reality, to be no exception in the present case from the general rule; for, fince good faith itself

obliges every man to perform his actual engagements, it of course obliges the mandatary to exert himself in proportion to the exigence of the affair in hand, and neither to do any thing, how minute foever, by which his employer may fuftain damage, nor omit any thing, however inconfiderable, which the nature of the act requires*: nor will a want of ability to perform the contract be any defence for the contracting party; for, though the law exacts no impossible things, yet it may justly require, that every man shall know his own strength, before he undertakes to do an act, and that, if he delude another by false pretenfions to skill, he shall be responsible for any injury, that may be occasioned by such de-If, indeed, an unskilful man yield to lufion. the pressing instances of his friend, who could not otherwise have his work performed, and engage reluctantly in the business, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

It is almost needless to add, that a mandatary, as well as a depositary, may bind himself by a special agreement to be answerable even for cafualties; but that neither the one nor the other can exempt himself by any stipulation from responsibility for fraud, or, its equivalent, gross neglect.

* Lord Raym. 910.

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A distinction seems very early to have been made in our law between the nonfesance, and the misfefance, of a conductor operis, and, by equal reason, of a mandatary; or, in other words, between a total failure of performing an executory undertaking and a culpable neglect in executing it; for, when an action on the case was brought against a carpenter, who, having undertaken to build a new house for the plaintiff within a certain time, had not built it, the court gave judgment of nonfuit; but agreed, that, if the defendant had built the house negligently and spoiled the timber, an action against him would have been maintainable*. However, in a subsequent reign, when a fimilar action was commenced against one WATKINS for not building a mill according to his undertaking, there was a long conversation between the judges and the bar, which chief justice BABINGTON at length interrupted by ordering the defendant's counsel either to plead or to demur; but ferjeant ROLF chose to plead specially, and iffue was taken on a difcharge of the agreement. + Justice MARTIN objected to the action, because no tort was alledged; and he perfifted warmly in his opinion,

^{*} Yearb. 11. Hen. IV. 33.

⁺ Yearb. 3. Hen. VI. 36. b. 37. a. Stath. Abr. tit. Accions fur le cas, pl. 20.

which feems not wholly irreconcilable to that of his two brethren; for in the cases, which they put, a special injury was supposed to be occasioned by the non-performance of the contract.

Authority and reason both convince me, that Martin, into whose opinion the reporter recommends an inquiry, was wrong in his objection, if he meaned, as justice Cokain and the chief justice seem to have understood him, that no such action would lie for nonfesance, even though special damage had been stated. His argument was, that the action before them sounded in covenant merely, and required a specialty to support it; but that, if the covenant had been changed into a tort, a good writ of trespass on the case might have been maintained: he gave, indeed, an example of missesance, but did not controvert the instances, which were given by the other judges.

It was not alledged in either of the cases just cited, that the defendant was to receive pay for the session of his work; but, since both defendants were described as actually in trade, it was not perhaps intended, that they were to work for nothing: I cannot however persuade myself, that there would have been any difference, had the promises been purely gratuitous, and had a special injury been caused by the breach of them. Suppose, for instance, that Robert's corn-fields are sur-

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rounded by a ditch or trench, in which the water from a certain fpring used to have a free course, but which has of late been obstructed by foil and rubbish; and that, Robert informing his neighbour Henry of his intention speedily to clear the ditch, Henry offers and undertakes immediately to remove the obstruction and repair the banks without reward, he having business of the same kind to perform on his own grounds: if, in this case, Henry neglect to do the work undertaken, "and the water, not having its na-" tural course, overflow the fields of Robert and " fpoil his corn," may not Robert maintain his action on the case? Most assuredly; and so in a thousand instances of proper bailments, that might be supposed; where a just reliance on the promise of the defendant prevented the plaintiff from employing another person, and was confequently the cause of the loss, which he fustained*; for it is, as it ought to be, a general rule, that, for every damnum injurià datum, an action of fome fort, which it is the province of the pleader to advise, may be maintained; and, although the gratuitous performance of an act be a benefit conferred, yet, according to the just maxim of PAULUS, Adjuvari nos, non decipi, beneficio oportet †: but the special da-

^{*} Yearb. 19. Hen. VI. 49.

[†] D. 13. 6. 17. 3.

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mage, not the assumption, is the cause of this action; and, if notice be given by the mandatary, before any damage incurred, and while another person may be employed, that he cannot perform the work, no process of law can enforce the performance of it.

A case in Brook, made complete from the Year-book, to which he refers, seems directly in point; for, by chief justice Fineux, it had been adjudged, that, "if a man assume to build a "house for me by a certain day, and do not "build it, and I suffer damage by his nonfesance, "I shall have an action on the case, as well as if "he had done it amiss:" but it is possible, that Fineux might suppose a consideration, though none be mentioned*.

Actions on this contract are, indeed, very uncommon, for a reason not extremely flattering to human nature; because it is very uncommon to undertake any office of trouble without compensation; but, whether the case really happened, or the reward, which has actually been stipulated, was omitted in the declaration, the question, "whether a man was responsible for damage to certain goods occasioned by his negligence in performing a GRATUITOUS promise," came before the court, in which lord Holt presided, so lately as the second year of queen Anne; and

^{*} Bro. Abr. tit. Action sur le Case, 72.

a point, which the first elements of the Roman law have so fully decided, that no court of judicature on the continent would suffer it to be debated, was thought in England to deserve, what it certainly received, very great consideration*.

The case was this: BERNARD had assumed without pay safely to remove several casks of brandy from one cellar, and lay them down safely in another. but managed them so negligently, that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff Coggs, a motion was made in arrest of judgement on the irrelevancy of the declaration, in which it was neither alledged, that the defendant was to have any recompense for his pains, nor that he was a common porter: but the court were unanimously of opinion, that the action lay; and, as it was thought a matter of great consequence, each of the judges delivered his opinion separately.

The chief justice, as it has before been intimated, pronounced a clear, methodical, elaborate argument; in which he distinguished bailments into fix forts, and gave a history of the principal authorities concerning each of them.

^{*} Ld. Raym. 909—920. 1 Salk. 26. Com. 133. Farr.

⁺ P. 361.

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This argument is justly represented by my learned friend, the annotator on the First Institute, as "a most masterly view of the whole subject of "bailment*;" and, if my little work be considered merely as a commentary on it, the student may perhaps think, that my time and attention have not been unusefully bestowed.

For the decision of the principal case, it would have been sufficient, I imagine, to insist, that the point was not new, but had already been determined; that the writ in the REGISTER, called, in the strange dialect of our forefathers, De pipa vini cariandit, was not fimilar, but identical; for, had the reward been the effence of the action, it must have been inserted in the writ, and nothing would have been left for the declaration but the stating of the day, the year, and other circumstances; of which RASTELL exhibits a complete example in a writ and declaration for negligently and improvidently planting a quickfet bedge, which the defendant had promifed to raise, without any consideration alledged; and iffue was joined on a traverse of the negligence

^{*} Hargr. Co. Litt. 89. b. n. 3. The profession must lament the necessary suspension of this valuable work.

[†] Reg. Orig. 110. a. fee also 110. b. De equo insirmo sa-nando, and De columbari reparando.

and improvidence*. How any answer could have been given to these authorities, I am at a loss even to conceive: but, although it is needless to prove the same thing twice, yet other authorities, equally unanswerable, were adduced by the court, and supported with reasons no less cogent; for nothing, faid Mr. Justice Powell emphatically, is law, that is not reason; a maxim, in theory excellent, but in practice dangerous, as many rules, true in the abstract, are false in the concrete; for, fince the reason of TITIUS may, and frequently does, differ from the reason of SEPTIMIUS, no man, who is not a lawyer, would ever know how to act, and no man, who is a lawyer, would in many inftances know what to advise, unless courts were bound by authority, as firmly as the pagan deities were supposed to be bound by the decrees of fate.

Now the reason affigned by the learned judge for the cases in the Register and Year-books, which were the same with Coggs and Bernard, namely, "that the party's special assumpsite and undertaking obliged him so to do "the thing, that the bailor came to no damage by his neglect," seems to intimate, that the omission of the words salvo et secure would have made a difference in this case, as in that of a deposit; but I humbly contend, that those words are implied,

^{*} Rast. Entr. 13. b.

by the nature of a contract which lies in fesance, agreeably to the distinction with which I began this article. As judgement, indeed, was to be given on the record merely, it was unnecessary, and might have been improper, to have extended the proposition beyond the point then before the court; but I cannot think, that the narrowness of the proposition in this instance affects the general doctrine, which I have prefumed to lay down; and, in the strong case of the shepherd, who had a flock to keep, which he suffered through negligence to be drowned, neither a reward nor a special undertaking are stated*: that case, in the opinion of justice Townsend, depended upon the distinction between a bargain executed and executory; but I cannot doubt the relevancy of an action in the second case, as well as the first, whenever actual damage is occasioned by the nonfesance+.

There feems little necessity after this, to mention the case of POWTUARY and WALTON, the reason of which applies directly to the present subject; and, though it may be objected that the defendant was stated as a farrier, and must be

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^{*} Yearb. 2 Hen. VII. 11.

[†] Stath. Abr. tit. Accions fur le cas, pl. 11. By justice Passon,

[&]quot;fi un ferrour face covenant ove moy de ferrer mon chival,

[&]quot;jeo die qe sil ne ferra mon chival, uncore jeo averai accion

[&]quot; fur mon cas, qar en fon default paraventure mon chival est

prefumed to have acted in his trade, yet chief justice Rolle intimates no such presumption; but says expressly, that "an action on the case "lies upon this matter, without alledging any consideration: for the negligence is the cause of "action, and not the assumption."

A bailment without reward to carry from place to place is very different from a mandate to perform a work; and, there being nothing to take it out of the general rule, I cannot conceive that the bailee is responsible for less than gross neglect, unless there be a special acceptance: for instance, if Stephen desire Philip to carry a diamond-ring from Bristol to a person in London, and he put it with bank-notes of his own into a letter-case, out of which it is stolen at an inn, or feized by a robber on the road, Philip shall not be answerable for it; although a very careful, or perhaps a commonly prudent, man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage; but, if he were to fecrete bis own notes with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaife, I think he would be bound, in case of a loss by stealth or robbery, to restore the value of it to Stephen: every thing, therefore, that has been expounded

^{* 1} Ro. Abr. 1c.

in the preceding article concerning deposits, may be applied exactly to this fort of bailment, which may be considered as a subdivision of the second species.

Since we have nothing in these cases analogous to the judgements of infamy, which were often pronounced at Rome and Athens, it is hardly necessary to add, what appears from the speech of Cicero for S. Roscius of Ameria, that "the "ancient Romans considered a mandatary as in-"famous, if he broke his engagement, not only "by actual fraud, but even by more than ordi-"nary negligence*."

As to exceptions from the rule concerning the degree of neglect, for which a mandatary is refponsible, almost all, that has been advanced before in the article of deposits, in regard to a special convention, a voluntary offer, and an interest accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a work for the benefit of an absent pe son, and without his knowledge, is the negotiorum gestor of the civilians, and the obligation resulting from

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^{* &}quot;In privatis rebus, si quis rem mandatam non modo ma-

[&]quot; litiosius gessisset, su quæstus en commodi causa, verumetiam

[&]quot; negligentius, eum majores summum admissse dedecus existi-

[&]quot; mabant: itaque mandar constitutum est judicium, non minus

[&]quot;turpe quam furti." Pro S. Rosc. p. 116. Glasg.

his implied contract has been incidentally mentioned in a preceding page.

III. On the third species of bailment, which is one of the most usual and most convenient in civil fociety, little remains to be observed; because our own, and the Roman, law are on this head perfectly coincident. I call it, after the French lawyers, loan for use, to distinguish it from their loan for consumption, or the MUTUUM of the Romans; by which is understood the lending of money, wine, corn, and other things, that may be valued by number, weight, or meafure, and are to be restored only in equal value or quantity*: this latter contract, which, according to St. GERMAN, is most properly called a loan, does not belong to the present subject; but it may be right to remark, that, as the specifick things are not to be returned, the absolute pro-

^{*} Doct. and Stud. dial. 2. ch. 38. Bract. 99. 2. b. In Ld. Raym. 916. where this paffage from Bracton is cited by the chief justice, mutuam is printed for commodatam; but what then can be made of the words ad IPSAM restituendam? There is certainly some mistake in the passage, which must be very ancient, for the oldest MS. that I have seen, is conformable to Tottel's edition. I suspect the omission of a whole line after the word precium, where the manuscript has a full point; and possibly the sentence omitted may be thus supplied from Justinian, whom Bracton copied: "At is, qui mutuum accepit, obligatus remanet," si forte incendio, &c. Ing. 3. 13. 2:

perty of them is transferred to the borrower. who must bear the loss of them, if they be destroyed by wreck, pillage, fire, or other inevitable misfortune. Very different is the nature of the bailment in question; for a horse, a chariot, a book, a greyhound, or a fowling-piece, which are lent for the use of the bailee, ought to be redelivered specifically; and the owner must abide the loss, if they perish through any accident, which a very careful and vigilant man could not have avoided. The negligence of the borrower, who alone receives benefit from the contract, is conftrued rigorously, and, although flight, makes him liable to indemnify the lender; nor will his incapacity to exert more than ordinary attention avail him on the ground of an impossibility, " which the law, fays the rule, never de-"mands;" for that maxim relates merely to things absolutely impossible; and it was not only very possible, but very expedient, for him to have examined his own capacity of performing the undertaking, before he deluded his neighbour by engaging in it: if the lender, indeed, was not deceived, but perfectly knew the quality, as well as age, of the borrower, he must be supposed to have demanded no higher care, than that of which fuch a person was capable; as, if Paul lend a fine horse to a raw youth, he cannot exact the same degree of management and cir-

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cumfpection, which he would expect from a riding mafter or an officer of dragoons*.

From the rule, that a borrower is answerable for flight neglect, compared with the distinction before made between simple theft and robberyt, it follows, that, if the borrowed goods be stolen out of his possession by any person whatever, he must pay the worth of them to the lender, unless he prove, that they were purloined notwithstanding his extraordinary care. The example, given by JULIAN, is the first and best that occurs: Caius borrows a filver ewer of Titius, and afterwards delivers it, that it may be fafely restored, to a bearer of such approved fidelity and wariness, that no event could be less expected than its being stolen; if, after all, the bearer be met in the way by fcoundrels, who contrive to fleal it, Caius appears to be wholly blamelefs, and Titius has suffered damnum fine injurid. It seems hardly necessary to add, that the same care, which the bailee is bound to take of the principal thing bailed, must be extended to such accessory things, as belong to it, and were delivered with it: thus a man, who borrows a watch, is responsible for flight neglect of the chain and feals.

Although the laws of Rome, with which those

^{*} Dumoulin, tract. De eo quod interest, n. 185.

[†] See p. 370. and note†.

of England in this respect agree, most expressly decide, that a borrower, using more than ordinary diligence, shall not be chargeable, if there be a force which he cannot resist, yet Pufen-DORF employs much idle reasoning, which I am not idle enough to transcribe, in support of a new opinion; namely, "that the borrower ought to " indemnify the lender, if the goods lent be de-66 stroyed by fire, shipwreck, or other inevitable " accident, and without his fault, unless his own " perish with them:" for example, if Paul lend William a horse worth thirty guineas to ride from Oxford to London, and William be attacked on a heath in that road by highwaymen, who kill or feize the horse, he is obliged, according to Pufendorf and his annotator, to pay thirty guineas to Paul. The justice and good sense of the contrary decision are evinced beyond a doubt by M. POTHIER, who makes a distinction between those cases, where the loan was the occasion merely of damage to the lender, who might in the mean time have fultained a loss from other accidents, and those, where the loan was the fole efficient cause of his damage; as if Paul, having lent his horse, should be forced in the interval by some pressing business to bire an-

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^{*} D. 44. 7. 1. 4. Ld. Raym. 916.

[†] Poth. Prêt à Usage, n. 55. Puf. with Barbeyrae'. notes, B. 5. C. 4. § 6.

other for himself; in this case the borrower ought, indeed, to pay for the hired horse, unless the lender had voluntarily submitted to bear the inconvenience caused by the loan; for, in this sense and in this instance, a benefit conferred should not be injurious to the benefactor. As to a condition pre-sumed to be imposed by the lender, that he would not abide by any loss occasioned by the lending, it seems the wildest and most unreasonable of presumptions: if Paul really intended to impose such a condition, he should have declared his mind; and I persuade myself, that William would have declined a favour so hardly obtained.

Had the borrower, indeed, been imprudent enough to leave the high road and pass through some thicket, where robbers might be supposed to lurk, or had he travelled in the dark at a very unseasonable hour, and had the horse, in either case, been taken from him or killed, he must have indemnished the owner; for irresistible force is no excuse, if a man put himself in the way of it by his own rashness. This is nearly the case, cited by St. German from the Summa Rosella, where a loan must be meaned, though the word depositum be erroneously used; and it is there decided, that, if the borrower of a horse will im-

^{*} Doll. and Stud. where before cited.

prudently ride by a ruinous bouse in manifest danger of falling, and part of it actually fall on the horse's head, and kill him, the lender is entitled to the price of him; but that, if the house were in good condition and fell by the violence of a sudden hurricane, the bailee shall be discharged. For the same, or a stronger, reason, if William, instead of coming to London, for which purpose the horse was lent, go towards Bath, or, having borrowed him for a week, keep him for a month, he becomes responsible for any accident, that may befall the horse in his journey to Bath, or after the expiration of the week*.

Thus, if Charles, in a case before put; wear the masked habit and jewels of George at the ball, for which they were borrowed, and be robbed of them in his return home at the usual time and by the usual way, he cannot be compelled to pay George the value of them; but it would be otherwise, if he were to go with the jewels from the theatre to a gaming-house, and were there to lose them by any casualty whatever. So, in the instance proposed by Gasus in the digest, if silver utensils be lent to a man for the purpose of entertaining a party of friends at supper in the metropolis, and he carry them into the country, there can be no doubt of his ob-

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[†] P. 377.

ligation to indemnify the lender, if the plate be lost by accident however irresistible.

There are other cases, in which a borrower is chargeable for inevitable mischance, even when he has not, as he legally may, taken the whole risk upon himself by express agreement. For example, if the house of Caius be in flames, and he, being able to fecure one thing only, fave an urn of his own in preference to the filver ewer, which he had borrowed of Titius, he shall make the lender a compensation for the loss; especially if the ewer be the more valuable, and would confequently have been preferred, had he been owner of them both: even if his urn be the more precious, he must either leave it, and bring away the borrowed vessel, or pay Titius the value of that, which he has loft; unless the alarm was fo fudden, and the fire fo violent, that no deliberation or felection could be juftly expected, and Caius had time only to fnatch up the first utenfil, that prefented itself.

Since openness and honesty are the soul of contracts, and since "a suppression of truth is often "as culpable as an express falsehood," I accede to the opinion of M. POTHIER, that, if a soldier were to borrow a horse of his friend for a battle expected to be fought the next morning, and were to conceal from him, that his own horse was as fit for the service, and if the horse, so bor-

rowed, were flain in the engagement, the lender ought to be imdemnified; for probably the diffimulation of the borrower induced him to lend the horse; but, had the soldier openly and frankly acknowledged, that he was unwilling to expose his own horse, since, in case of a loss, he was unable to purchase another, and his friend, nevertheless, had generously lent him one, the lender would have run, as in other instances, the risk of the day.

If the bailee, to use the Roman expression, be IN MORA, that is, if a legal demand have been made by the bailor, he must answer for any casualty that happens after the demand; unless in cases, where it may be strongly presumed, that the same accident would have befallen the thing bailed, even if it had been restored at the proper time; or unless the bailee have legally tendered the thing, and the bailor have put himself in mord by resusing to accept it: this rule extends of course to every species of bailment.

"Whether, in case of a valued loan, or, where "the goods lent are estimated at a certain price, "the borrower must be considered as bound in "all events to restore either the things lent or "the value of them," is a question, upon which the civilians are as much divided, as they are upon the celebrated clause in the law Contractus: sive or six commentators of high reputation enter

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the lifts against as many of equal fame, and each fide difplays great ingenuity and address in this juridical tournament. D'AVEZAN fupports the affirmative; and POTHIER, the negative; but the fecond opinion feems the more reasonable. The word PERICULUM, used by ULPIAN, is in itself equivocal: it means bazard in general, proceeding either from accident or from neglect; and in this latter fense it appears to have been taken by the Roman lawyer in the paffage, which gave birth to the dispute. But, whatever be the true interpretation of that passage, I cannot satisfy myself, that, either in the Customary Provinces of FRANCE, or in ENGLAND, a borrower can be chargeable for all events without his confent unequivocally given: if William, indeed, had faid to Paul alternatively, "I promise, on my return to " Oxford, either to restore your horse or to pay "you thirty guineas," he must in all events have performed one part of this disjunctive obligation*; but, if Paul had only faid, "the horse, "which I lend you for this journey, is fairly "worth thirty guineas," no more could be implied from those words, than a design of preventing any future difficulty about the price, if the horse should be killed or injured through an omission of that extraordinary diligence, which the nature of the contract required.

^{*} Palm. 551.

Besides the general exception to the rule concerning the degrees of neglect, namely, Si quid convenit vel plus vel minus, another is, where goods are lent for a use, in which the lender has a common interest with the borrower: in this case, as in other bailments reciprocally advantageous, the bailee can be responsible for no more than ordinary negligence; as, if Stephen and Philip invite some common friends to an entertainment prepared at their joint expence, for which purpose Philip lends a fervice of plate to his companion, who undertakes the whole management of the feast, Stephen is obliged only to take ordinary care of the plate; but this, in truth, is rather the innominate contract do ut facias, than a proper loan.

Agreeably to this principle, it must be decided, that, if goods be lent for the fole advantage of the lender, the borrower is answerable for gross neglect only; as, if a passionate lover of musick were to lend his own instrument to a player in a concert, merely to augment his pleasure from the performance; but here again, the bailment is not so much a loan, as a mandate; and, if the musician were to play with all due skill and exertion, but were to break or hurt the instrument without any malice or very culpable negligence, he would not be bound to indemnify the amateur, as he was not in want of the instrument,

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and had no particular defire to use it. If, indeed, a poor artist, having lost or spoiled his violin or slute, be much distressed by this loss, and a brother-musician obligingly, though voluntarily, offer to lend him his own, I cannot agree with Despenses, a learned advocate of Montpellier and writer on Roman law, that the player may be less careful of it than any other borrower: on the contrary, he is bound, in conscience at least, to raise his attention even to a higher degree; and his negligence ought to be construed with rigour.

By the law of Moses, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the absence, or the presence, of the owner; for, says the divine legislator, "if a "man borrow aught of his neighbour, and it be hurt or die, the owner thereof not being with it, he shall surely make it good; but, if the owner thereof be with it, he shall not make it good*:" now it is by no means certain, that the original word signifies the owner, for it may signify the possessor, and the law may import, that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed; but, if it was intended, that the borrower should always

^{*} Exod. xxii. 14, 15.

answer for casualties, except in the case, which must rarely happen, of the owner's presence, this exception seems to prove, that no casualties were meaned, but such as extraordinary care might have prevented; for I cannot see, what difference could be made by the presence of the owner, if the force, productive of the injury, were wholly irresistible, or the accident inevitable.

An old Athenian law is preserved by DE-MOSTHENES, from which little can be gathered on account of its generality and the use of an ambiguous word*; it is understood by Petit as relating to guardians, mandataries, and commissioners; and it is cited by the orator in the case of a guardianship. The Athenians were, probably, satisfied with speaking very generally in their laws, and left their juries, for juries they certainly had, to decide favourably or severely, according to the circumstances of each particular case.

IV. As to the degree of diligence, which the law requires from a pawnee, I find myfelf again obliged to diffent from fir EDWARD COKE, with whose opinion a similar liberty has before been taken in regard to a depositary; for that very learned man

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^{*} Περί ων καθυρικέ τις, ὁμοίως ὁρλισκάνειν, ώσως ἀν αὐσὸς ἔχη. Reifke's edition, 855. 3. Here the verb καθυριέναι, may imply flight, or ordinary, neglect; or even fraud, as Petit has rendered it.

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lays it down, that, "if goods be delivered to "one as a gage or pledge, and they be ftolen, "he shall be discharged, because be hath a pro"perty in them; and, therefore, he ought to "keep them no otherwise than his own*:" I deny the first proposition, the reason, and the conclusion.

Since the bailment, which is the subject of the present article, is beneficial to the pawnee by securing the payment of his debt, and to the pawnor by procuring him credit, the rule, which natural reason prescribes, and which the wisdom of nations has confirmed, makes it requisite for the person, to whom a gage or pledge is bailed, to take ordinary care of it; and he must consequently be responsible for ordinary neglect. This is expressly holden by BRACTON; and, when I rely on his authority, I am perfectly aware, that he copied JUSTINIAN almost word for word, and that lord Holt, who makes confiderable use of his treatife, observes three or four times, "that "he was an old author;" but, although he had been a civilian, yet he was also a great common-lawyer, and never, I believe, adopted the rules and expressions of the Romans, except when they coincided with the laws of England

^{* 1} Inft. 89. a. 4 Rep. 83. b. ‡ Ld. Raym. 915, 916. 919.

⁺ Bract. 99. b.

in his time: he is certainly the best of our juridical clafficks; and, as to our ancient authors, if their doctrine be not law, it must be left to mere historians and antiquaries; but, if it remain unimpeached by any later decision, it is not only equally binding with the most recent law, but has the advantage of being matured and approved by the collected fagacity and experience of ages. The doctrine in question has the full affent of lord Holt himself, who declares it to be " fufficient, if the pawnee use true, and ordi-" nary, diligence for restoring the goods, and "that, fo doing, he will be indemnified, and, " notwithstanding the loss, shall refort to the " pawnor for his debt." Now it has been proved, that " a bailee cannot be confidered " as using ordinary diligence, who suffers the " goods bailed to be taken by stealth out of his "custody";" and it follows, that "a pawnee " shall not be discharged, if the pawn be simply " ftolen from him; but if he be forcibly robbed " of it without his fault, his debt shall not be " extinguished.

The passage in the Roman institutes, which BRACTON has nearly transcribed, by no means convinces M. LE BRUN, that a pawnee and a borrower are not responsible for one and the same degree of negligence; and it is very certain, that

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^{*} P. 370. note+.

ULPIAN, speaking of the Actio pignoratitia, uses these remarkable words: "Venit in bac actione " et dolus et culpa uT in commodato, venit et cus-"todia; vis major non venit." To folve this difficulty, Noodt has recourse to a conjectural emendation, and supposes ur to have been inadvertently written for AT; but, if this was a mistake, it must have been pretty ancient, for the Greek translators of this sentence use a particle of fimilitude, not an adversative: there feems, however, no occasion for so hazardous a mode of criticism. ULPIAN has not said, " talis culpa qualis in commodato;" nor does the word ut imply an exact resemblance: he meaned, that a pawnee was answerable for neglect, and gave the first instance, that occurred, of another contract, in which the party was likewise answerable for neglect, but left the sort or degree of negligence to be determined by his general rule; conformably to which he himself expressly mentions PIGNUS among other contracts reciprocally useful, and distinguishes it from COMMODATUM, whence the borrower folely derives advantage*.

It is rather less easy to answer the case in the book of Assign, which seems wholly subversive of my reasoning, and, if it stand unexplained, will break the harmony of my system; for there, in

^{*} Before, p. 370.

^{+ 29} Aff. pl. 28.

an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, "that it was delivered to him " in gage for a certain fum of money; that he " had put it among his other goods; and that all " together had been ftolen from him:" now, according to my doctrine, the plaintiff might have demurred to the plea; but he was driven to reply, "that he tendered the money before the fteal-" ing, and that the creditor refused to accept it," on which fact iffue was joined; and the reason, affigned by the chief justice, was, that, "if a " man bail goods to me to keep, and I put them " among my own, I shall not be charged, if they " be stolen." To this case I answer: first, that, if the court really made no difference between a pawnee and a depositary, they were indubitably mistaken; for which affertion I have the authority of BRACTON, lord HOLT, and St. GER-MAN, who ranks the taker of a pledge in the fame class with a birer of goods*; next, that in a much later case, in the reign of HEN. VI. where a biring of custody seems to be meaned, the distinction between a theft and a robbery is taken agreeably to the Roman law+; and, lastly, that, although in the strict propriety of our English language, to fleal is to take clandestinely, and to rob

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^{*} Doct. and Stud. dial 2. ch. 38.

[†] Before, p. 370. notet.

is to feize by violence, corresponding with the Norman verbs embleer and robber, yet those words are fometimes used inaccurately; and I always suspected, that the case in the book of Assis related to a robbery, or a taking with force; a fufpicion confirmed beyond any doubt by the judicious Brook, who abridges this very cafe with the following title in the margin, "Que ferra " al perde, quant les biens font robbes*:" and, in a modern work, where the old cases are referred to, it appears to have been fettled, in conformity to them and to reason, "that if the pawn be laid " up, and the pawnee be robbed, he shall not be "answerable +: " but lord Coke seems to have used the word stolen in its proper sense, because he plainly compares a pawn with a deposit.

If, indeed, the thing pledged be taken openly and violently through the fault of the pledgee, he shall be responsible for it; and after a tender and refusal of the money owed, which are equivalent to actual payment, the whole property is instantly revested in the pledgor, and he may consequently maintain an action of trover: it is said in a most useful work, that by such tender and resusal the thing pawned "ceases to be a pledge and becomes a deposits;" but this must be an error

^{*} Abr. tit. Bailment, pl. 7. † 2 Salk. 522.

^{1 29} Aff. pl. 28. Yelv. 179. Ratcliff and Davis.

[§] Law of Nifi Prius, 72.

of impression; for there can never be a deposit without the owner's consent, and a depositary would be chargeable only for gross negligence, whereas the pawnee, whose special property is determined by the wrongful detainer, becomes liable in all possible events to make good the thing lost, or to relinquish his debt*.

The reason, given by Coke for his doctrine, namely, "because the pawnee has a property in " the goods pledged," is applicable to every other fort of bailment, and proves nothing in regard to any particular species; for every bailee has a temporary qualified property in the things, of which possession is delivered to him by the bailor, and has, therefore, a possession or an appeal in his own name against any stranger, who may damage or purloin them+. By the Roman law, indeed, "even the possession of the " depositary was holden to be that of the person " depositing;" but with us the general bailee has unquestionably a limited property in the goods intrusted to his care: he may not, however, use them on any account without the confent of the owner, either expressly given, if it can possibly be obtained, or at least strongly prefumed; and this prefumption varies, as the thing is likely to be better, or worse, or not at all af-

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^{*} Ld. Raym. 917. + Yearb. 21 Hen. VII. 14. b. 15. a.

fected, by ulage; fince, if Caius deposit a fettingdog with Titius, he can hardly be supposed unwilling, that the dog should be used for partridge-shooting, and thus be confirmed in those habits, which make him valuable; but, if clothes or linen be deposited by him, one can scarce imagine, that he would fuffer them to be worn; and, on the other hand, it may justly be inferred, that he would gladly indulge Titius in the liberty of using the books, of which he had the custody, fince even moderate care would prevent them from being injured. In the same manner it has been holden, that the pawnee of goods, which will be impaired by usage, cannot use them; but it would be otherwise, I apprehend, if the things pawned actually required exercise and a continuance of habits, as sporting-dogs and horses: if they cannot be hurt by being worn, they may be used, but at the peril of the pledgee; as, if chains of gold, ear-rings, or bracelets, be left in pawn with a lady, and she wear them at a publick place, and be robbed of them on her return, she must make them good: " if she keeps "them in a bag," fays a learned and respectable writer, " and they are stolen, she shall not be " charged";" but the bag could hardly be taken privately and quietly without her omission of or-

^{*} Law of Nisi Prius, 72.

dinary diligence; and the manner, in which lord HOLT puts the case, establishes my system, and confirms the answer just offered to the case from the Year-book; for, " if she keep the jewels," fays he, " locked up in her cabinet, and " her cabinet be broken open, and the jewels taken "thence, she will not be answerable"." Again; it is faid, that, where the pawnee is at any expense to maintain the thing given in pledge, as, if it be a horse or a cow, he may ride the horse moderately, and milk the cow regularly. by way of compensation for the charge; and this doctrine must be equally applicable to a general bailee, who ought neither to be injured nor benefited in any respect by the trust undertaken by him; but the Roman and French law, more agreeably to principle and analogy, permits indeed both the pawnee and the depositary to milk the cows delivered to them, but requires them to account with the respective owners for the value of the milk and calves, deducting the reafonable charges of their nourishment‡. It follows from these remarks, that lord Coke has affigned an inadequate reason for the degree of diligence, which is demanded of a pawnee; and the true reason is, that the law requires nothing extraordinary of him.

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^{*} Ld. Raym. 9:7. † Ow. 124.

I Poth. Dépôt, n. 47. Nantiffement, n. 35.

But, if the receiver in pledge were the only bailee, who had a special property in the thing bailed, it could not be logically inferred, "that, "therefore, he ought to keep it merely as his "own:" for, even if Caius have an absolute undivided property in goods, jointly or in common with Septimius, he is bound by rational, as well as positive, law to take more care of them than of his own, unless he be in fact a prudent and thoughtful manager of his own concerns; since every man ought to use ordinary diligence in affairs, which interest another as well as himself: "Aliena negotia," says the emperor Constantine, "exacto officio geruntur"."

The conclusion, therefore, drawn by fir ED-WARD COKE, is no less illogical than his premisses are weak; but here I must do M. Le Brun the justice to observe, that the argument, on which his whole system is founded, occurred likewise to the great oracle of English law; namely, that a person, who had a property in things committed to his charge, was only obliged to be as careful of them as of his own goods; which may be very true, if the sentence be predicated of a man ordinarily careful of his own; and, if that was Le Brun's hypothesis, he has done little more than adopt the system of Gode-

^{*} C. 4. 35. 21.

FROI, who exacts ordinary diligence from a partner and a co-proprietor, but requires a higher degree in eight of the ten preceding contracts.

Pledges for debt are of the highest antiquity: they were used in very early times by the roving Arabs, one of whom finely remarks, "that the "life of man is no more than a pledge in the hands "of Destiny;" and the salutary laws of Moses, which forbade certain implements of husbandry and a widow's raiment to be given in pawn, deferve to be imitated as well as admired. The distinction between pledging, where possession, where it remains with the debtor, was originally Attick; but scarce any part of the Athenian laws on this subject can be gleaned from the ancient orators, except what relates to bottomry in five speeches of Demosthenes.

I cannot end this article, without mentioning a fingular case from a curious manuscript preferved at Cambridge, which contains a collection of queries in Turkish, together with the decisions or concise answers of the Mufts at Constantinople: it is commonly imagined, that the Turks have a translation in their own language of the Greek code, from which they have supplied the defects of their Tartarian and Arabian jurisprudence*;

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^{*} Duck de Auth. Jur. Civ. Rom. I. 2. 6.

but I have not met with any fuch translation, although I admit the conjecture to be highly probable, and am perfuaded, that their numerous treatifes on Mahomedan law are worthy on many accounts of an attentive examination. The case was this: " Zaid had left with Amru divers " goods in pledge for a certain fum of money, " and some ruffians, having entered the house of " Amru, took away his own goods together " with those pawned by Zaid." Now we must necessarily suppose, that the creditor had by his own fault given occasion to this robbery; otherwife we may boldly pronounce, that the Turks are wholly unacquainted with the imperial laws of BYZANTIUM, and that their own rules are totally repugnant to natural justice; for the party proceeds to ask, "whether, since the debt became " extinct by the loss of the pledge, and fince the " goods pawned exceeded in value the amount " of the debt, Zaid could legally demand the " balance of Amru;" to which question the great law-officer of the Othman court answered with the brevity usual on such occasions, OL-MAZ, It cannot be*. This custom, we must con-

^{*} Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton, LL. Hywel Dda. lib. 2. cap. 2. § 29. note x. It may possibly be the usage in Turkey to stipulate "ut amissio pignoris liberet de-"bitorem," as in C. 4. 24. 6.

fess, of proposing cases both of law and conscience under feigned names to the supreme judge, whose answers are considered as solemn decrees, is admirably calculated to prevent partiality and to save the charges of litigation.

V. The last species of bailment is by no means the least important of the five, whether we consider the infinite convenience and daily use of the contract itself, or the variety of its branches, each of which shall now be succinctly, but accurately, examined.

1. Locatio, or locatio-conductio, REI, is a contract, by which the hirer gains a transient qualified property in the thing hired, and the owner acquires an absolute property in the stipend, or price, of the hiring; fo that, in truth, it bears a strong resemblance to the contract of emptio-venditio, or sale; and, fince it is advantageous to both contracting parties, the harmonious confent of nations will be interrupted, and one object of this essay defeated, if the laws of England shall be found, on a fair inquiry, to demand of the hirer a more than ordinary degree of diligence. In the most recent publication, that I have read on any legal fubject, it is expressly faid, "that the hirer is to take all imaginable " care of the goods delivered for hire":" the

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^{*} Law of Niss Prius, 3d edition corrected, 72.

words all imaginable, if the principles before established be just, are too strong for practice even in the strict case of borrowing; but, if we take them in the mildest sense, they must imply an extraordinary degree of care; and this doctrine, I presume, is founded on that of lord HOLT in the case of Coggs and BERNARD, where the great judge lays it down, " that, if goods are let out " for a reward, the birer is bound to the UTMOST . " diligence, fuch as the MOST diligent father of " a family uses *." It may seem bold to controvert so respectable an opinion; but, without infifting on the palpable injustice of making a borrower and a birer answerable for precisely the fame degree of neglect, and without urging, that the point was not then before the court. I will engage to show, by tracing the doctrine up to its real fource, that the dictum of the chief justice was entirely grounded on a grammatical mistake in the translation of a fingle Latin word.

In the first place, it is indubitable, that his lordship relied folely on the authority of Bracton; whose words he cites at large, and immediately subjoins, "whence it appears, &c." now the words, "talis ab eo desideratur custodia, "qualem DILIGENTISSIMUS paterfamilias suis

^{*} Ld. Raym. 916.

" rebus adhibit," on which the whole question depends, are copied exactly from Justinian*, who informs us in the proeme to his Institutes. that his decisions in that work were extracted principally from the Commentaries of GAIUS; and the epithet diligentissimus is in fact used by this ancient lawyer +, and by bim alone, on the fubject of hiring: but GAIUS is remarked for writing with energy, and for being fond of using fuperlatives, where all other writers are fatisfied with politives; fo that his forcible manner of expressing himself, in this instance as in some others, misled the compilers employed by the Emperor, whose words Theophilus rendered more than literally, and BRACTON transcribed; and thus an epithet, which ought to have been translated ordinarily diligent, has been supposed to mean extremely careful. By rectifying this mistake, we restore the broken harmony of the pandects with the institutes, which, together with the code, form one connected works, and, when properly understood, explain and illustrate each other; nor is it necessary, I conceive, to adopt the interpretation of M. DE FERRIERE, who ima-

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^{*} Bract. 62. b. Justin. Inst. 3. 25. 5. where Theophilus has δ σφόδομα διαμμελίτατος.

[†] D 19. 2. 25. 7. ‡ Le Brun, p. 93. § Burr. 426. VOL. VI. E E

gines, that both Justinian and Gaius are fpeaking only of cases, which from their nature demand extraordinary care *.

There is no authority then against the rule, which requires of a hirer the same degree of diligence, that all prudent men, that is, the generality of mankind, use in keeping their own goods; and the just distinction between borrowing and hiring, which the 'fewish lawgiver emphatically makes, by faying, "if it be an hired thing, it came for its bire †," remains established by the concurrent wisdom of nations in all ages.

If Caius therefore hire a horse, he is bound to ride it as moderately and treat it as carefully, as any man of common discretion would ride and treat his own horse; and if, through his negligence, as by leaving the door of his stable open at night, the horse be stolen, he must answer for it; but not if he be robbed of it by highwaymen, unless by his imprudence he gave occafion to the robbery, as by travelling at unufual hours, or by taking an unufual road: if, indeed, he hire a carriage and any number of horses. and the owner fend with them his postilion or coachman, Caius is discharged from all attention to the horses, and remains obliged only to

^{*} Inft. vol. V. p. 138. † Exod. xxii. 15.

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take ordinary care of the glasses and inside of the carriage, while he sits in it.

Since the negligence of a fervant, acting under bis master's directions express or implied, is the negligence of the mafter, it follows, that, if the fervant of Caius injure or kill the horse by riding it immoderately, or, by leaving the stabled door open, suffer thieves to steal it, Caius must make the owner a compensation for his loss*; and it is just the same, if he take a ready-furnished lodging, and his guests, or servants, while they act under the authority given by him, damage the furniture by the omission of ordinary care. At Rome the law was not quite fo rigid; for POMPONIUS, whose opinion on this point was generally adopted, made the master liable, only when he was culpably negligent in admitting careless guests or servants, whose bad qualities he ought to have known †: but this distinction must have been perplexing enough in practice; and the rule, which, by making the head of a family answerable indiscriminately for the faults of those, whom he receives or employs, compels him to keep a vigilant eye on all his domesticks, is not only more simple, but more conducive to the publick security, although it may be rather harsh

^{*} Salk. 282. Ld. Raym. 619. † D. 19. 2. 11.

in some particular instances*. It may here be observed, that this is the only contract, to which the Erench, from whom our word bailment was borrowed, apply a word of the same origin; for the letting of a house or chamber for hire is by them called bail à loyer, and the letter for hire, bailbeur, that is, bailor, both derived from the old verb bailler, to deliver; and, though the contracts, which are the subject of this essay, be generally confined to moveable things, yet it will not be improper to add, that, if immoveable property, as an orchard, a garden, or a farm, be letten by parol, with no other stipulation thans for the price or rent, the leffee is bound to use the same diligence in preserving the trees, plants, or implements, that every prudent person would use, if the orchard, garden, or farm, were his own.

2. Locatio OPERIS, which is properly fubdivisible into two branches, namely, faciendi, and mercium vebendarum, has a most extensive influence in civil life; but the principles, by which the obligations of the contracting parties may be ascertained, are no less obvious and rational, than the objects of the contract are often vast and important †.

^{*} Poth. Louage, n. 193.

[†] It may be useful to mention a nicety of the Latin language in the application of the verbs locare and conducere: the em-

If Titius deliver filk or velvet to a tailor for a fuit of clothes, or a gem to a jeweller to be fet or engraved, or timber to a carpenter for the rafters of his house, the tailor, the engraver, and the builder, are not only obliged to perform their feveral undertakings in a workmanly manner*: but, fince they are entitled to a reward, either by express bargain or by implication, they must also take ordinary care of the things respectively bailed to them: and thus, if a horse be delivered either to an agisting farmer for the purpose of depasturing in his meadows, or to an hostler to be dressed and fed in his stable, the bailees are answerable for the loss of the horse, if it be occasioned by the ordinary neglect of themselves or their servants. It has, indeed, been adjudged, that, if the horse of a guest be fent to pasture by the owner's desire, the innholder is not, as fuch, responsible for the loss

ployer, who gives the reward, is *locator operis*, but *conductor operarum*; while the party employed, who receives the pay, is *locator operarum*, but *conductor operis*. Heinecc. in *l'and*. par. 3. § 320. So, in *Horace*,

" Tu fecanda marmora

" Locas"_

which the stonehewer or mason conduxit.

* 1 Ventr. 268. erroneously printed 1 Vern. 268. in all the editions of Bl. Comm. II. 452. The innumerable multitude of inaccurate or idle references, in our best reports and law-tracts, is the bane of the student and of the practiser.

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of him by theft or accident *; and, in the case of Mosley and Fosset, an action against an agister for keeping a horse so negligently that it was stolen, is said to have been held maintainable only by reason of a special assumption +; but the case is differently reported by ROLLE, who mentions no fuch reason; and, according to him, chief justice POPHAM advanced generally, in conformity to the principles before established, that, " if a man, to whom horses are " bailed for agistment, leave open the gates of " his field, in consequence of which neglect " they stray and are stolen, the owner has an " action against him:" it is the same, if the innkeeper fend his gueft's horfe to a meadow of his own accord, for he is bound to keep fafely all fuch things as his guests deposit within his inn, and shall not discharge himself by his own act from that obligation; and, even when he turns out the horse by order of the owner, and receives pay for his grass and care, he is chargeable, furely, for ordinary negligence, as a bailee for hire, though not as an innkeeper by the general custom of the realm. It may be worth while to investigate the reasons of this general custom, which in truth means no more than common law, concerning innholders*.

^{* 8} Rep. 32. Cayle's cafe. + Mo. 543. 1 Ro. Abr. 4. ‡ Reg. Orig. 105. a. Noy, Max. ch. 43.

Although a stipend or reward in money be the essence of the contract called locatio, yet the same responsibility for neglect is justly demanded in any of the innominate contracts, or, whenever a valuable confideration of any kind is given or stipulated. This is the case, where the contract do ut des is formed by a reciprocal bailment for use, as if Robert permit Henry to use his pleafure-boat for a day, in consideration that Henry will give him the use of his chariot for the same time; and fo in ten thousand instances, that might be imagined, of double bailments: this too is the case, if the absolute property of one thing be given as an equivalent for the temporary or limited property of another, as if Charles give George a brace of pointers for the use of his hunter during the feason. The same rule is applicable to the contract facio ut facias, where two persons agree to perform reciprocal works; as if a mason and a carpenter have each respectively undertaken to build an edifice, and they mutually agree, that the first shall finish all the masonry, and the second all the wood-work, in their respective buildings; but, if a goldsmith make a bargain with an architect to give him a quantity of wrought plate for building his house, this is the contract do ut facias, or facio ut des; and, in all these cases, the bailees must answer for the omiffion of ordinary diligence in preferv-

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ing the things, with which they are intrusted: fo, when Jacob undertook the care of Laban's slocks and herds for no less a reward than his younger daughter, whom he loved so passionately, that seven years were in his eyes like a few days, he was bound to be just as vigilant, as if he had been paid in shekels of silver.

Now the obligation is precifely the fame, as we have already hinted*, when a man takes upon himself the custody of goods in confequence and confideration of another gainful contrast; and, though an innholder be not paid in money for fecuring the traveller's trunk, yet the guest facit ut faciat, and alights at the inn, not folely for his own refreshment, but also that his goods may be fafe: independently of this reasoning, the custody of the goods may be confidered as accessary to the principal contract. and the money paid for the apartments as extending to the care of the box or portmanteau; in which light GAIUS and, as great a man as he, lord Holt, feem to view the obligation; for they agree, "that, although a bargeman " and a master of a ship receive their fare for " the passage of travellers, and an innkeeper " his pay for the accommodation and enter-" tainment of them, but have no pecuniary re-" ward for the mere custody of the goods be-

^{*} P. 375, 376.

" longing to the paffengers or guefts, yet they

" are obliged to take ordinary care of those

" goods; as a fuller and a mender are paid for

"their skill only, yet are answerable, ex locato,

" for ordinary neglect, if the clothes be lost or

" damaged *."

In whatever point of view we confider this bailment, no more is regularly demanded of the bailee than the care, which every prudent man takes of his own property; but it has long been holden, that an innkeeper is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through one of his agents, be damaged in his inn, or stolen out of it, by any person whatever †; nor shall he discharge himself from this responsibility by a refusal to take any care of the goods, because there are suspected persons in the house, for whose conduct he cannot be answerable : it is otherwise, indeed, if he refuse admission to a traveller, because he really has no room for him, and the traveller, nevertheless, insist upon entering, and place his baggage in a chamber without the keeper's confent %.

Add to this, that, if he fail to provide honest fervants and honest inmates, according to the considence reposed in him by the publick, his

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^{*} D. 4. 9. 5. and 12 Mod. 487.

[†] Yearb. 10 Hen. VII. 26. 2 Cro. 189.

[‡] Mo. 78. § Dy. 158. b. 1 And. 29.

negligence in that respect is highly culpable, and he ought to answer civilly for their acts, even if they should rob the guests, who sleep in his chambers *. Rigorous as this law may feem, and hard as it may actually be in one or two particular inftances, it is founded on the great principle of publick utility, to which all private confiderations ought to yield; for travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of affociating with ruffians or pilferers, while the injured guest could feldom or never obtain legal proof of fuch combinations, or even of their negligence, if no actual fraud had been committed by them. Hence the Prætor declared, according to Pomponius, bis desire of securing the public from the dishonesty of such men, and by his edict gave an action against them, if the goods of travellers or paffengers were lost or hurt by any means, except damno fatali, or by inevitable accident; and ULPIAN intimates, that even this feverity could not reftrain them from knavish practices or suspicious neglect +.

^{* 1} Bl. Comm. 430.

[†] D. 4. 9. 1. and 3.

In all fuch cases, however, it is competent for the innholder to repel the presumption of his knavery or default, by proving that he took ordinary care, or that the force, which occasioned the loss or damage, was truly irresistible.

When a private man demands and receives a compensation for the bare custody of goods in his warehouse or store-room, this is not properly a deposit, but a biring of care and attention: it may be called locatio custodiæ, and might have been made a distinct branch of this last fort of bailment, if it had not feemed ufeless to multiply fubdivisions; and the bailee may still be denominated locator opera, fince the vigilance and care, which he lets out for pay, are in truth a mental operation. Whatever be his appellation, either in English or Latin, he is clearly responfible, like other interested bailees, for ordinary negligence; and, although St. GERMAN feems to make no difference in this respect between a keeper of goods for bire and a simple depositary, yet he uses the word DEFAULT, like the CUL-PA of the Romans, as a generical term, and leaves the degree of it to be ascertained by the rules of law*.

In the sentence immediately following, he makes a very material distinction between the two contracts; for, "if a man, says he, have

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^{*} Doff. and Stud. where before cited.

a certain recompense for the keeping of goods, " and promise, at the time of the delivery, to " redeliver them safe at his peril, then he shall " be charged with all chances, that may befall; " but, if he make that promise, and have " nothing for keeping them, he is bound to no « cafualties, but fuch as are wilful, and happen by bis own default:" now the word PERIL. like periculum, from which it is derived, is in itself ambiguous, and sometimes denotes the risk of inevitable mischance, sometimes the danger arising from a want of due circumspection; and the stronger sense of the word was taken in the first case against him, who uttered it; but, in the fecond, where the construction is favourable, the milder fense was justly preferred*. Thus, when a person, who, if he were wholly uninterested, would be a mandatary, undertakes for a reward to perform any work, he must be considered as bound still more strongly, to use a degree of diligence adequate to the performance of it: his obligation must be rigorously construed, and he would, perhaps, be answerable for flight neglect, where no more could be required of a mandatary than ordinary exertions. This is the case of commissioners, factors, and bailiss, when their undertaking lies in fefance, and not fimply

^{*} See before, p. 370.

in custody: hence, as peculiar care is demanded in removing and raising a fine column of granate or porphyry, without injuring the shaft or the capital, GAIUS feems to exact more than ordinary diligence from the undertaker of fuch a work for a stipulated compensation*. Lord COKE confiders a factor in the light of a fervant, and thence deduces his obligation; but, with great submission, his reward is the true reason, and the nature of the business is the just measure, of his duty +; which cannot, however, extend to a responsibility for mere accident or open robberyt; and, even in the case of theft, a factor has been holden excused, when he showed, "that he had laid up the goods of his principal " in a warehouse, out of which they were " stolen by certain malefactors to him un-" known \"

Where skill is required, as well as care, in performing the work undertaken, the bailee for hire must be supposed to have engaged himself for a due application of the necessary art: it is his own fault, if he undertake a work above his strength; and all, that has before been advanced on this head concerning a mandatary, may be applied with much greater force to a conductor

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^{*} D. 19. 2. 7. † 4 Rep. 84. Ld. Raym. 918.

^{† 1} Inst. 89. 2. § 1 Vent. 121. Vere and Smith.

operis faciendi*. I conceive, however, that, where the bailor has not been deluded by any but himself, and voluntarily employs in one art a man, who openly exercises another, his folly has no claim to indulgence; and that, unless the bailee make false pretentions, or a Special undertaking, no more can fairly be demanded of him than the best of his ability +. The case, which SADI relates with elegance and humour in his Gulistan or Rose-Garden, and which Pufendorf cites with approbation 1, is not inapplicable to the present subject, and may ferve as a specimen of Mahomedan law, which is not fo different from ours, as we are taught to imagine: 'A man, who had a difforder in his eyes, called on a farrier for a re-• medy; and he applied to them a medicine commonly used for bis patients: the man lost ' his fight, and brought an action for damages; but the judge said, "No action lies, for, if " the complainant had not himself been an ass, " he would never have employed a farrier;" ' and SADI proceeds to intimate, that, " if a " person will employ a common mat-maker to " weave or embroider a fine carpet, he must " impute the bad workmanship to his own " folly §."

^{*} Spondet, fay the Roman lawyers, peritiam artis.

[†] P. 381. ‡ De Jure Nat. et Gent. lib. 5. cap. 5. § 3.

Rosar. Polit. cap. 7. There are numberless tracts in

In regard to the diffinction before-mentioned between the nonfesance and the missesance of a workman*, it is indisputably clear, that an action lies in both cases for a reparation in damages, whenever the work was undertaken for a reward, either actually paid, expressly stipulated, or, in the case of a common trader, ftrongly implied; of which BLACKSTONE gives the following instance: " If a builder promises, " undertakes, or assumes to Caius, that he will " build and cover his house within a time li-" mited, and fails to do it, Caius has an action " on the case against the builder for this breach " of his express promise, and shall recover a " pecuniary fatisfaction for the injury fustained "by fuch delay+." The learned author meaned, I presume, a common builder, or supposed a consideration to be given; and for this reason I forbore to cite his doctrine as in point on the subject of an action for the nonperformance of a mandataryt.

Before we leave this article, it feems proper to remark, that every bailee for pay, whether

Avabick, Persian, and Turkish, on every branch of jurisprudence; from the best of which it would not be difficult to extract a complete system, and to compare it with our own; nor would it be less easy, to explain in Persian or Arabick such parts of our English law, as either coincide with that of the Asiaticks, or are manifestly preferable to it.

* P. 382, &c. † 3 Comm. 157. ‡ P. 383, 384, 385.

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conductor rei or conductor operis, must be suppoled to know, that the goods and chattels of his bailor are in many cases distrainable for rent, if his landlord, who might otherwise be shamefully defrauded, find them on the premisses*; and, as they cannot be distrained and sold without his ordinary default at least, the owner has a remedy over against him, and must receive a compensation for his loss; even if a depositary were to remove or conceal bis own goods, and those of his depositor were to be seized for rentarrere, he would unquestionably be bound to make restitution; but there is no obligation in the bailee to suggest wife precautions against inevitable accident; and he cannot, therefore, be obliged to advise insurance from fire; much less to infure the things bailed without an authority from the bailor.

It may be right also to mention, that the distinction, before taken in regard to loans;, between an obligation to restore the specifick things, and a power or necessity of returning others equal in value, holds good likewise in the contracts of biring and depositing: in the first case, it is a regular bailment; in the second, it becomes a debt. Thus, according to ALFENUS in his samous law, on which the judicious

^{*} Burr. 1498. &c. † 3. Bl. Comm. 8. ‡ P. 392.

BYNKERSHOEK has learnedly commented, " if " an ingot of filver be delivered to a filver-" fmith to make an urn, the whole property is " transferred, and the employer is only a credi-" tor of metal equally valuable, which the " workman engages to pay in a certain shape ":" the fmith may confequently apply it to his own use; but, if it perish, even by unavoidable mischance or irrefiftible violence, he, as owner of it, must abide the loss, and the creditor must have his urn in due time. It would be otherwife, no doubt, if the fame filver, on account of its peculiar fineness, or any uncommon metal, according to the whim of the owner, were agreed to be fpecifically redelivered in the form of a cup or a standish.

3. Locatio operis MERCIUM VEHENDARUM is a contract, which admits of many varieties in form, but of none, as it feems at length to be fettled, in the fubstantial obligations of the bailee.

A carrier for bire ought, by the rule, to be responsible only for ordinary neglect; and, in the time of Henry VIII. it appears to have been generally holden, "that a common carrier" was chargeable, in case of a loss by robbery, "only when he had travelled by ways danger-

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^{*} D. 19. 2. 31. Bynk. Obf. Jur. Rom. lib. VIII. VOL. VI.

" ous for robbing, or driven by night, or at any inconvenient hour*:" but, in the commercial reign of ELIZABETH, it was refolved, upon the same broad principles of policy and convenience that have been mentioned in the case of innholders, "that, if a common carrier be robbed of the goods delivered to him, he shall answer for the value of them †."

Now the reward or hire, which is confidered by fir EDWARD COKE as the reason of this decision, and on which the principal stress is often laid in our own times, makes the carrier liable, indeed, for the omission of ordinary care, but cannot extend to irresistible force; and, though some other bailees have a recompense, as factors and workmen for pay, yet, even in Woodliese's case, the chief justice admitted, that robbery was a good plea for a factor, though it was a bad one for a carrier: the true ground of that resolution is the publick employment exercised by the carrier, and the danger of his combining with robbers to the infinite injury of commerce and extreme inconvenience of society ‡.

The modern rule concerning a common carrier is, that "nothing will excuse him, except the

^{*} Doct. and Stud. where often before cited.

^{† 1} Inft. 89. a. Mo. 462. 1 Ro. Abr. 2. Woodliefe and

[†] Ld. Raym. 917. 12 Mod. 487.

" act of God, or of the King's enemies*;" but a momentary attention to the principles must convince us, that this exception is in truth part of the rule itself, and that the responsibility for a loss by robbers is only an exception to it: a carrier is regularly answerable for neglect, but not, regularly, for damage occasioned by the attacks of rustians, any more than for hostile violence, or unavoidable missortune; but the great maxims of policy and good government make it necessary to except from this rule the case of robbery, lest confederacies should be formed between carriers and desperate villains with little or no chance of detection.

Although the Act of God, which the ancients too called Occ Sian and Vim divinam, be an expression, which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as more decent, to substitute in its place inevitable accident: religion and reason, which can never be at variance without certain injury to one of them, assure us, that "not a gust of wind blows, nor "a slash of lightning gleams, without the "knowledge and guidance of a superintending "mind;" but this doctrine loses its dignity and sublimity by a technical application of it,

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^{*} Law of Nisi Prius, 70, 71.

which may in some instances border even upon profaneness; and law, which is merely a practical science, cannot use terms too popular and perspicuous.

In a recent case of an action against a carrier, it was holden to be no excuse, "that the ship "was tight, when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole, through "which the water had gushed*;" but the true reason of this decision is not mentioned by the reporter: it was in fact at least ordinary negligence, to let a rat do such mischief in the vessel; and the Roman law has, on this principle, decided, that, "si fullo vestimenta polienda" acceperit, eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere†."

Whatever doubt there may be, among civilians and common-lawyers, in regard to a casket, the contents of which are concealed from the DE-POSITARY; it seems to be generally understood, that a common carrier is answerable for the loss of a box or parcel, be he ever so ignorant of its contents, or be those contents ever so valuable, unless he make a special acceptance s: but gross fraud and imposition by the bailor will deprive

^{* 1} Wils. part 1. 281. Dale and Hall.

⁺ D. 19. 2. 13. 6. ‡ Before, p. 362, 364, 366.

^{§ 1} Stra. 145. Titchburn and White.

him of his action, and if there be proof, that the parties were apprized of each other's intentions, although there was no personal communication, the bailee may be considered as a special acceptor: this was adjudged in a very modern case particularly circumstanced, in which the former cases in Ventris, Alleyne, and Carthew, are examined with liberality and wisdom; but, in all of them, too great stress is laid on the reward, and too little on the important motives of public utility, which alone distinguish a carrier from other bailees for hire*.

Though no fubstantial difference is assignable between carriage by land and carriage by water, or, in other words, between a waggon and a barge, yet it soon became necessary for the courts to declare, as they did in the reign of JAMES I., that a common hoyman, like a common waggoner, is responsible for goods committed to his custody, even if he be robbed of them; but the reason said to have been given for this judgement, namely, because he had his hire, is not the true one; since, as we have, before suggested, the recompense could only make

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^{*} Burr. 2298. Gibbon and Paynton. See 1 Vent. 238. All. 93. Carth. 485.

⁺ Hob. ca. 30. 2 Cro. 330. Rich and Kmeland. "The "first case of the kind, said lord Holt, to be found in our books." 12 Mod. 480.

him liable for temerity and imprudence, as if a bargemaster were rashly to shoot a bridge, when the bent of the weather is tempestuous; but not for a mere casualty, as if a hoy in good condition, shooting a bridge at a proper time, were driven against a pier by a sudden breeze, and overset by the violence of the shock*; nor, by parity of reason, for any other force too great to be resisted; the publick employment of the hoyman, and that distrust, which an ancient writer justly calls the sinew of wisdom, are the real grounds of the law's rigour in making such a person responsible for a loss by robbery.

All, that has just been advanced concerning a land-carrier, may, therefore, be applied to a bargemaster or boatman; but, in case of a tempest, it may sometimes happen, that the law of jetson and average may occasion a difference. Barcrost's case, as it is cited by chief justice Rolle, has some appearance of hardship: "a "box of jewels had been delivered to a ferry-

- man, who knew not what it contained, and, a
- "fudden from arifing in the passage, he threw
- " the box into the fea; yet it was refolved, that
- " he should answer for it : " now I cannot help

^{* 1} Stra. 128. Amies and Stevens.

[†] Palm. 548. W. Jo. 159. See the doctrine of inevitable accident most learnedly discussed in Desid. Heraldi Animadv. in Salmasii Observ. in Jus Att. et Rom. cap. xv.

[†] All. 93.

fuspecting, that there was proof in this case of culpable negligence, and probably the casket was both small and light enough, to have been kept longer on board than other goods; for, in the case of Gravesend barge, cited on the bench by lord Coke, it appears, that the pack, which was thrown overboard in a tempest, and for which the bargeman was holden not answerable, was of great value and great weight; although this last circumstance be omitted by Rolle, who says only, that the master of the vessel had no information of its contents.

The subtilty of the human mind, in finding distinctions, has no bounds; and it was imagined by some, that, whatever might be the obligation of a barge-master, there was no reason to be equally rigorous in regard to the master of a ship; who, if he carry goods for profit, must indubitably answer for the ordinary neglect of himself or his mariners, but ought not, they said, to be chargeable for the violence of robbers: it was, however, otherwise decided in the great case of Mors and Slew, where "eleven persons armed "came on board the ship in the river, under "pretence of impressing seamen, and forcibly "took the chests, which the defendant had en-"gaged to carry;" and, though the master was

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^{* 2} Bulstr. 280. 2. Ro. Abr. 567.

entirely blameless, yet sir Matthew Hale and his brethren, having heard both civilians and common-lawyers, and, among them, Mr. Holt for the plaintiff, determined, on the principles just before established, that the bailor ought to recover*. This case was frequently mentioned afterwards by lord Holt, who said, that "the "declaration was drawn by the greatest pleader "in England of his time†."

Still farther: fince neither the element, on which goods are carried, nor the magnitude and form of the carriage, make any difference in the responsibility of the bailee, one would hardly have conceived, that a diverfity could have been taken between a letter and any other thing. Our common law, indeed, was acquainted with no fuch diversity; and a private post-master was precisely in the situation of another carrier; but the statute of CHARLES II. having established a general post-office, and taken away the liberty of fending letters by a private post;, it was thought, that an alteration was made in the obligation of the post-master general; and, in the case of Lane and Cotton, three judges determined, against the fixed and well-supported opinion of chief justice Holt, " that the post-master was not

^{* 1} Ventr. 190. 238. Raym. 220.

⁺ Ld. Raym. 920.

^{1 12} Cha. II. ch. 35. See the subsequent statutes.

answerable for the loss of a letter with exche-" quer-bills in it*:" now this was a case of ordinary neglect, for the bills were stolen out of the plaintiff's letter in the defendant's office+; and. as the master has a great falary for the discharge of his trust; as he ought clearly to answer for the acts of his clerks and agents; as the statute, professedly enacted for sufety as well as dispatch, could not have been intended to deprive the subject of any benefit, which he before enjoyed; for these reasons, and for many others, I believe that CICERO would have faid, what he wrote on a fimilar occasion to TREBATIUS, " Ego tamen "SCEVOLE affentior!" It would, perhaps, have been different under the statute, if the post had been robbed, either by day or by night,

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^{*} Carth. 487. 12 Mod. 482.

[†] In addition to the authorities, before cited, p. 370. note (†), for the distinction between a loss by stealth and by robbery, see Dumoulin, tract. De eo quod interest, note 184. and Rosella Casuum, 28. b. This last is the book, which St. German improperly calls Summa Rosella, and by misquoting which he missed me in the passage concerning the fall of a house, p. 396. The words of the author, Trovamala, are these: "Domus tua minabatur ruinam; domus corruit, et interficite quum tibi commodatum; certe non potest dicicasus fortuitus; quia diligentissimus reparasset domum, vel ibi non hase bitasset; si autem domus non minabatur ruinam, sed impetu tempestatis validæ corruit, non est tibi imputandum."

[‡] Epist. ad Fam. VII. 22.

when there is a necessity of travelling, but even that question would have been disputable; and here I may conclude this division of my essay, with observing, in the plain but emphatical language of St. German, "that all the former diversities be "granted by secondary conclusions derived upon "the law of reason, without any statute made in "that behalf; and, peradventure, laws and the "conclusions therein be the more plain and the "more open; for if any statute were made therein, I think verily, more doubts and questions "would arise upon the statute, than doth now, when they be only argued and judged after the common law*."

Before I finish the bistorical part of my essay, in which I undertook to demonstrate, "that a "perfect harmony subsisted on the interesting "branch of jurisprudence in the codes of nations "most eminent for legal wisdom;" I cannot forbear adding a few remarks on the institutions of those nations, who are generally called barbarous, and who seem in many instances to have deferved that epithet: although traces of sound reasoning and solid judgement appear in most of their ordinances.

By the ancient laws of the Wisigorns, which are indeed rather obscure, the "keeper of

^{*} Doct. and Stud. dial. 2. chap. 38. last sentence.

[†] P. 335.

" a horse or an ox for bire, as well as a birer for " use, was obliged, if the animal perished, to re-"turn another of equal worth:" the law of the Baiuvarians on this head is nearly in the same words; and the rule is adopted with little alteration in the capitularies of CHARLEMAGNE and LEWIS the Pious*, where the Mosaick law before cited concerning a borrower may also be found†. In all these codes a depositary of gold, filver, or valuable trinkets, is made chargeable, if they are destroyed by fire, and his own goods perish not with them; a circumstance, which fome other legislators have confidered as conclufive evidence of gross neglect or fraud: thus, by the old Briti/btract, called the book of CYNAWG, a person, who had been robbed of a deposit, was allowed to clear himself by making oath, with compurgators, that he had no concern in the robbery, unless be bad saved his own goods; and it was the fame, I believe, among the Britons in the case of a loss by fire, which happened without the fault of the bailee; although Howel the Good feems to have been rigorous in this cafe, for the fake of publick fecurity . There was

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^{*} Lindenbrog, LL. Wisigoth. lib. 5. tit. 5. § 1, 2, 3. and LL. Baiuvar. tit. 14. § 1, 2, 3, 4. Capitul. lib. 5. § 204.

⁺ Capitul. lib. 6. § 22. Exod. xxii. 14, 15.

[‡] LL. Hywel Dda, lib. 3. cap. 4. § 22. and lib. 3. cap.

^{3. § 40.} See also Stiernb. De Jur. Sveon. p. 256, 257.

one regulation in the northern code, which I have not feen in that of any other nation: if precious things were deposited and ftolen, time was given to search for the thief, and, if he could not be found within the time limited, a moiety of the value was to be paid by the depositary to the owner, "ut damnum ex medio uterque "fustineret*."

Now I can scarce persuade myself, that the phrase used in these laws, si id perierit, extends to a perishing by inevitable accident; nor can I think, that the old Gothick law, cited by STIERN-HOOK, fully proves his affertion, that "a de-" positary was responsible for irresistible force;" but I observe, that the military law-givers of the north, who entertained very high notions of good faith and honour, were more strict than the Romans in the duties, by which depositaries and other trustees were bound: an exact conformity could hardly be expected between the ordinances of polished states, and those of a people, who could fuffer disputes concerning bailments to be decided by combat; for it was the Emperor FREDERICK II., who abolished the trial by battle in cases of contested deposits, and substituted a more rational mode of prooft.

^{*} L.L. Wifigoth, lib. 5. tit. 5. § 3.

[†] LL. Longobard. lib. 2. tit. 55. § 35. Constit. Neapol. lib. 2. tit. 34.

I purposely referved to the last the mention of the Hindu, or Indian code, which the learning and industry of my much-esteemed friend Mr. Halhed has made accessible to Europeans, and the Persian translation of which I have had the pleasure of seeing: these laws, which must in all times be a singular object of curiosity, are now of infinite importance; since the happiness of millions, whom a series of amazing events has subjected to a British power, depends on a strict observance of them.

It is pleasing to remark the similarity, or rather identity, of those conclusions, which pure unbiassed reason in all ages and nations seldom fails to draw, in such juridical inquiries as are not settered and manacled by positive institution; and, although the rules of the Pundits concerning succession to property, the punishment of offences, and the ceremonies of religion, are widely different from ours, yet, in the great system of contrasts and the common intercourse between man and man, the Pootee of the Indians and the Digest of the Romans are by no means diffimilar*.

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^{* &}quot;Hæc omnia, says Grotius, Romanis quidem con"gruunt legibus, sed non ex illis primitus, sed ex aquitate na"turali, veniunt: quare eadem apud alias quoque gentes
"reperire est." De Jure Belli ac Pacis, lib. 2. cap. 12.
§ 13.

Thus, it is ordained by the fages of Hindustán, that "a depositor shall carefully inquire into "the character of his intended depositary; who, " if he undertake to keep the goods, shall pre-" ferve them with care and attention; but shall " not be bound to restore the value of them, if " they be spoiled by unforeseen accident, or burned, " or flolen; unless he conceal any part of them, " that has been faved, or unless his own effects " be fecured, or unless the accident happen after " his refusal to redeliver the goods on a de-" mand made by the depositor, or while the de-" positary, against the nature of the trust, pre-" fumes to make use of them:" in other words, "the bailee is made answerable for fraud, or " for fuch negligence as approaches to it ".

So, a borrower is declared to be chargeable even for cafualty or violence, if he fail to return the thing after the completion of the business, for which he borrowed it; but not, if it be accidentally lost or forcibly seized, before the expiration of the time, or the conclusion of the affair, for which it was lent; in another place, it is provided, that, if a pledge be damaged or lost by unforeseen accident, the creditor shall nevertheless recover his debt with interest, but the

^{*} Gentoo Laws, chap. IV. See before, p. 373.

[†] Same chapter. See before, p. 397.

debtor shall not be entitled to the value of his pawn*; and that, if the pledgee use the thing pledged, he shall pay the value of it to the pledgor in case of its loss or damage, whilst he uses it.

In the same manner, if a person bire a thing for use, or if any metal be delivered to a workman, for the purpose of making vessels or ornaments, the bailees are holden to be discharged, if the thing bailed be destroyed or spoiled by natural missortune or the injustice of the ruling power, unless it be kept after the time limited for the return of the goods, or the persormance of the work.

All these provisions are consonant to the principles established in this essay; and I cannot help thinking, that a clear and concise treatise, written in the Persian or Arabian language, on the law of Contrasts, and evincing the general conformity between the Asiatick and European systems, would contribute, as much as any regulation whatever, to bring our English law into good codur among those, whose sate it is to be under our dominion, and whose happiness ought to be a serious and continual object of our care.

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^{*} Chap. I. Sect. I. Before, p. 415. 416.

[†] Chap. I. Sect. II. Before, p. 409.

t Chap. IV. and Chap. X. Before, p. 418, 421.

Thus have I proved, agreeably to my undertaking, that the plain elements of natural law, on the fubject of BAILMENTS, which have been traced by a short analysis, are recognised and confirmed by the wisdom of nations*; and I hasten to the third, or fynthetical, part of my work, in which, from the nature of it, most of the definitions and rules, already given, must be repeated with little variation in form, and none in fubstance: it was at first my design, to subjoin, with a few alterations, the Synopsis of Delrio; but finding, that, as BYNKERSHOEK expresses himfelf with an honest pride, I had leisure sometimes to write, but never to copy, and thinking it unjust to embellish any production of mine with the inventions of another, I changed my plan; and shall barely recapitulate the doctrine expounded in the preceding pages, observing the method, which logicians call Synthesis, and in which all sciences ought to be explained.

- I. To begin then with definitions: 1. BAIL-MENT is a delivery of goods in trust, on a contract expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use, for which they were bailed, shall have elapsed or be performed.
- 2. Deposit is a bailment of goods to be kept for the bailor without a recompense.

^{*} Before, p. 328 and 337.

- 3. MANDATE is a bailment of goods, without reward, to be carried from place to place, or to have some act performed about them.
- 4. LENDING FOR USE is a bailment of a thing for a certain time to be used by the borrower without paying for it.
- 5. PLEDGING is a bailment of goods by a debtor to his creditor to be kept till the debt be discharged.
- 6. LETTING TO HIRE is I. a bailment of A THING to be used by the hirer for a compensation in money; or, 2. a letting out of WORK and LABOUR to be done, or CARE and ATTENTION to be bestowed, by the bailee, on the goods bailed, and that for a pecuniary recompense; or, 3. of CARE and PAINS in carrying the things delivered from one place to another for a stipulated or implied reward.
- 7. Innominate ballments are those, where the compensation for the use of a thing, or for labour and attention, is not pecuniary, but either 1. the reciprocal use or the gift of some other thing; or, 2. work and pains, reciprocally undertaken; or, 3. the use or gift of another thing in consideration of care and labour, and conversely.
- 8. Ordinary neglect is the omission of that care, which every man of common prudence, and vol. vi.

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capable of governing a family, takes of his own

9. GROSS neglect is the want of that care, which every man of common sense, bow inattentive

foever, takes of his own property.

10. SLIGHT neglect is the omission of that diligence, which very circumspect and thoughtful persons use in securing their own goods and chattels.

11. A NAKED CONTRACT is a contract made without consideration or recompense.

II. The rules, which may be confidered as axioms flowing from natural reason, good morals, and sound policy, are these:

1. A bailee, who derives no benefit from his undertaking, is responsible only for gross ne-

glect.

2. A bailee, who alone receives benefit from the bailment, is responsible for SLIGHT neglect.

3. When the bailment is beneficial to both parties, the bailee must answer for ORDINARY

neglect.

4. A SPECIAL AGREEMENT of any bailee to answer for more or less, is in general valid.

5. All bailees are answerable for actual FRAUD, even though the contrary be stipulated.

6. No bailee shall be charged for a loss by

inevitable ACCIDENT or irrefistible FORCE, except by special agreement.

- 7. ROBBERY by force is confidered as irre-fiftible; but a loss by private STEALTH is pre-fumptive evidence of ordinary neglect.
 - 8. Gross neglect is a violation of good faith.
- 9. No ACTION lies to compel performance of a naked contract.
- 10. A reparation may be obtained by fuit for every DAMAGE occasioned by an INJURY.
- his master's express or implied order, is the negligence of the MASTER.
- III. From these rules the following propositions are evidently deducible:
- I. A DEPOSITARY is responsible only for GROSS neglect; or, in other words, for a violation of good faith.
- 2. A DEPOSITARY, whose character is known to his depositor, shall not answer for mere neglect, if he take no better care of his own goods, and they also be spoiled or destroyed.
- 3. A MANDATARY to carry is responsible only for GROSS neglect, or a breach of good faith.
- 4. A MANDATARY to perform a work is bound to use a degree of diligence adequate to the performance of it.
 - 5. A man cannot be compelled by ACTION

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to perform his promife of engaging in a DEPOSIT or a MANDATE.

- 6. A reparation may be obtained by fuit for DAMAGE occasioned by the nonperformance of a promise to become a DEPOSITARY or a MANDATARY.
- 7. A BORROWER FOR USE is responsible for SLIGHT negligence.
- 8. A PAWNEE is answerable for ORDINARY neglect.
- 9. The HIRER of a THING is answerable for ORDINARY neglect.
- 10. A WORKMAN for HIRE must answer for ORDINARY neglect of the goods bailed, and apply a degree of SKILL equal to his undertaking.
- II. A LETTER to HIRE of his CARE and ATTENTION is responsible for ORDINARY negligence.
- 12. A CARRIER for HIRE, by land or by water, is answerable for ORDINARY neglect.
- IV. To these rules and propositions there are some exceptions:
- engages to keep, or to carry, the goods of another, though without reward, must answer for slight neglect.
- 2. If a man, through firong perfuasion and with reluctance, undertake the execution of a

MANDATE, no more can be required of him than a fair exertion of his ability.

- 3. All bailees become responsible for losses by CASUALTY or VIOLENCE, after their refusal to return the things bailed on a LAWFUL DE-MAND.
- 4. A BORROWER and a HIRER are answerable in ALL EVENTS, if they keep the things borrowed or hired after the stipulated time, or use them differently from their agreement.
- 5. A DEPOSITARY and a PAWNEE are anfwerable in ALL EVENTS, if they use the things deposited or pawned.
- 6. An INNKEEPER is chargeable for the goods of his guest within bis inn, if the guest be robbed by the fervants or inmates of the keeper.
- 7. A COMMON CARRIER, by land or by water, must indemnify the owner of the goods carried, if he be ROBBED of them.

V. It is no exception, but a corollary, from the rules, that "every bailee is responsible for a "loss by ACCIDENT or FORCE, however inevi-"table or irresistible, if it be occasioned by that "degree of negligence, for which the nature of his contract makes him generally answera-"ble;" and I may here conclude my discussion of this important title in jurisprudence with a general and obvious remark; that "all the pre-

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" ceding rules and propositions may be diversi-" fied to infinity by the circumstances of every " particular case;" on which circumstances it is on the continent the province of a judge appointed by the fovereign, and in ENGLAND, to our constant honour and happiness, of a jury freely chosen by the parties, finally to decide: thus, when a painted cartoon, pasted on canvas, had been deposited, and the bailee kept it so near a damp wall, that it peeled and was much injured, the question " whether the depositary " had been guilty of GROSS neglect," was properly left to the jury, and, on a verdict for the plaintiff, with pretty large damages, the court refused to grant a new trial*; but it was the judge, who determined, that the defendant was by law responsible for gross negligence only; and, if it had been proved, that the bailee had kept his own pictures of the same fort in the fame place and manner, and that they too had been spoiled, a new trial would, I conceive, have been granted; and so, if no more than SLIGHT neglect had been committed, and the jury had, nevertheless, taken upon themselves to decide against law, that a bailee without reward was responsible for it.

Should the method used in this little tract be approved, I may possibly not want inclination,

^{* 2} Stra. 1099. Mytton and Cock.

if I do not want leisure, to discuss in the same form every branch of English law, civil and criminal, private and publick; after which it will be easy to separate and mould into distinct works, the three principal divisions, or the analytical, the bistorical, and the synthetical, parts.

The great fystem of jurisprudence, like that of the Universe, confifts of many subordinate fystems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully perfuaded myfelf, is reducible to a few plain elements, either the wife maxims of national policy and general convenience, or the positive rules of our forefathers, which are feldom deficient in wisdom or utility: if LAW be a science, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason; but, if it be merely an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and He will become the greatest lawyer, who has the strongest habitual, or artificial, memory. In practice, law certainly employs two of the mental faculties; reason, in the primary investigation and decifion of points entirely new; and memory, in transmitting to us the reason of sage and learned men, to which our own ought invariably to

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yield, if not from a becoming modesty, at least from a just attention to that object, for which all laws are framed, and all societies instituted, THE GOOD OF MANKIND.

ADVERTISEMENT.

AFTER I had finished the preceding tract, to the fatisfaction of feveral friends, but not to my own, I was informed, that the learned CHRIS-TIAN THOMASIUS had published a differtation on the same subject with the following title: De Usu Practico Doctrinæ disficillimæ Juris Romani de Culparum Præstatione in Contractibus; HALE, MDCCV. The fame of the author, and the high applause, which the very fensible Bynkershoek bestows on him, impressed me with a most favourable idea of his work, and with a strong defire to procure it; but, to my extreme disappointment, I cannot find it in any library, publick or private, in the Metropolis or in either of our Universities: I have sent for it, however, to Germany, and, when I receive it, shall take a fincere pleasure, either in correcting such errors, as it may enable me to detect in my effay, or in confirming the fystem, which I have adopted, by fo respectable an authority.

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AN INQUIRY

INTO

THE LEGAL MODE

OF

SUPPRESSING RIOTS,

WITH

A CONSTITUTIONAL PLAN

OF

FUTURE DEFENCE.

Res videas quo modo se habeant: orbem terrarum, imperiis distributis, ardere bello; urbem sine legibus, sine judiciis, sine jure, sine side, relictam direptioni et incendiis.

CIC. Epist. ad Fam. 4. 1.

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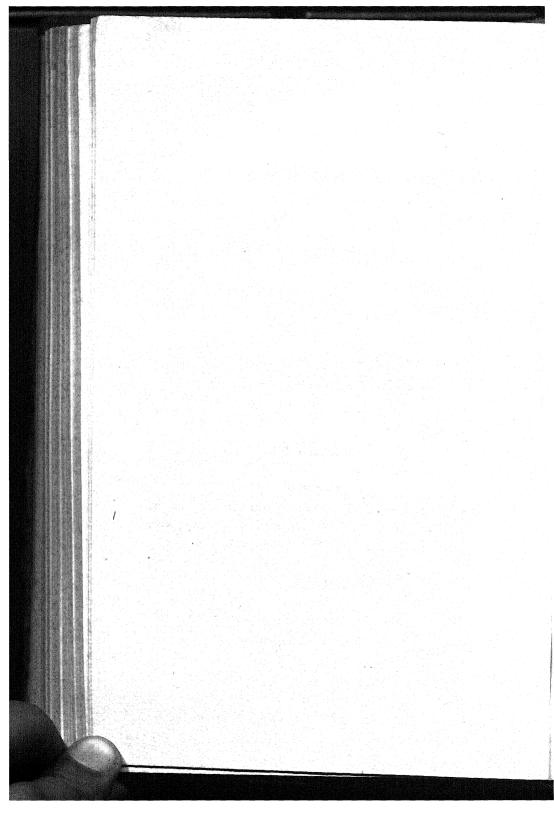
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AN INQUIRY

INTO

THE LEGAL MODE

OF

SUPPRESSING RIOTS.

IT has long been my opinion, that, in times of national adversity, those citizens are entitled to the highest praise, who, by personal exertions and active valour, promote at their private hazard the general welfare; that the fecond rank in the scale of honour is due to those, who, in the great council of the nation, or in other affemblies, legally convened, propose and enforce with manly eloquence what they conceive to be falutary or expedient on the occasion; and that the third place remains for those persons, who, when they have neither a necessity to act, nor a fair opportunity to fpeak, impart in writing to their countrymen fuch opinions as their reafon approves, and fuch knowlege as their painful researches have enabled them to acquire.

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With these restrictions, the sword, the tongue, and the pen, which have too often been employed by the worst passions to the worst purposes, may become the instruments of exalted virtue; instruments, which it is not the right only, but the duty, of every man to use, who can use them; paying always a sacred regard to the laws of that country, which he undertakes to defend, to advise, or to enlighten.

A fense of this duty and a consciousness of this right have impelled me, with no views, as it will be readily believed, of ambition or interest, much less from any factious motive, to take up that instrument, which I have stated as the least honourable of the three, and to present the publick with a few considerations on a subject no less interesting at the present hour than important to all future ages.

Having unhappily been a vigilant and indignant spectator of the late abominable enormities; having seen the senate besieged, and the senators insulted; the laws of our country defied, and the law of nations violated; having beheld the houses of our truest patriots and most respectable magistrates either destroyed, assailed, or menaced; having passed a whole night encircled by the blazing habitations of unossending individuals, and by the slames of those edifices which publick justice had allotted to various classes of of-

fenders; having lamented over a great metropolis exposed for many days to the sury of a licentious rabble; having believed the noblest commercial City in the world to be in danger of a
second conflagration; having in vain sought access to the courts at Westminster in full term,
and to the houses of parliament in full session;
having, in a word, been witness to horrors, all
the concurrent causes of which are not easy to
be known, and all the consequences of which are
less easy to be predicted; I could not but see at
length, with a mixed sensation, between anguish
and joy, the vigorous and triumphant exertions
of the executive power; and I admitted the necessity of those exertions, whilst I deplored it.

Every well-disposed man, and lover of tranquillity, must have rejoiced, that, on the ninth of June, the peaceable and terrified inhabitants of this noble Capital might enjoy repose; that the valuable effects, which many had removed, and some had even buried, might be replaced; that the artisan might resume his implements, and the student, his books; that justice had reascended her seat; and that order was succeeding to confusion, harmony to discord; but every honest man and lover of his country must have grieved, that a whole week was then before us, in which the necessary adjournment of the Commons, who would otherwise have been deliberating on

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the state of the metropolis and the kingdom, had left us under a power, which, whatever it might be in form and in effect, was in truth and substance, dictatorial.

In this awful interval a question occurred to me, which must naturally have presented itself to many others: "Whether the still-subsisting "laws and genuine constitution of England "had not armed the civil state with a power sufficient, if it had been previously understood and prepared, to have suppressed ever so formidable a riot without the intervention of the military."

If no fuch power legally existed in the state; our system, I thought, must be desective in a most essential point; since no people can be really and substantially free, whose freedom is so precarious, in the true sense of the word, as to depend on the protection of the soldiery; and even our protectors, who for several days possibly could not, but certainly did not, act at all, might have been necessarily called away, in the most dangerous moment, to defend our coasts and maritime towns: if, on the other hand, such a power of self-protection did exist, our laws, I concluded, must have been disgracefully neglected, and ought to be restored to full vigour and energy.

A very short inquiry enabled me to answer

the question, at least to my own satisfaction, in the affirmative; and it is the result of this inquiry, which I now request the public to accept with the indulgence due to an occasional production, and with the attention due to a subject of general importance.

This then is the proposition, which I undertake to demonstrate: "That the common, and "statute, laws of the realm, in force at this day, "give the *civil* state in every county a power, "which, if it were perfectly understood and continually prepared, would effectually quell any riot or insurrection, without assistance from the *military*, and even without the modern riot-act."

To this proposition I shall strictly, and, as far as I am able, logically confine myself; avoiding all parade of legal or antiquarian learning, and omitting all such disquisitions as might answer the purpose of ostentation, which I distain, but not of utility, which alone I seek: should the curious and intelligent reader be desirous of investigating the powers of magistrates and of courts in recording riots and punishing rioters, and of tracing the history of our ancient and modern laws for the preservation of publick tranquillity, from that of king INA to that of George the First, he will receive ample information from the various books of authority, which I shall

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have occasion to cite in the course of my argument.

It is in every one's mouth, that, on all violent breaches of the peace, the sheriff of the county is not only authorized but commanded to raife the Posse Comitatus, and forcibly to suppress the tumult; but, if most of those, who use this expression, will examine their own minds, they will presently perceive, that they utter words, which convey to them no distinct idea, and that the power of the county, like many other powers in nature and jurisprudence, is very ill ascertained. and very imperfectly comprehended. Logicians give us an admirable rule, "that we should feek " after a clear, precise and complete conception of things, as they really exist in their own nature " and in all their parts, and should not always " imagine that there are ideas, because there are " words":" let us apply this rule to the case before us, and endeavour to form a luminous, fixed, comprehensive notion of the power in question; without supposing that we comprehend it, merely because we know, that, besides its Latin name, it is called in Norman French, Poiar del Countee, and fometimes, Aide del pais+.

We cannot begin our investigation under a

more certain or more respectable guide, than Chief Justice Fineux, whose words I shall transcribe from that most venerable repository of genuine English wisdom, the Year books*: "At the beginning," fays that learned Judge, " all the administration of justice was in one " hand, namely, in the Crown; then, after the " multiplication of the people, that administra-"tion was distributed into counties, and the " power was committed to a deputy in each " county, namely, the Viscount, or Sheriff; who " was the King's deputy to preferve the peace; " and thus it is, that all people must, in obe-"dience to him, be ready in defence of the " realm, when enemies come: thus too was he " affigned to be a conservator of the peace, to " punish malefactors, to defend the realm when " enemies invade it, to be attendant on the King " in war-time, and to cause all people in his "county to go with the King to defend the " land against enemies."

Who the people are, that the laws of England required, and still require, to be ready and obedient to the sheriff on all occasions of publick disturbance, we learn from the judicious antiquary, LAMBARD, who cites and adopts the opinion of Mr. Marrow delivered in a work,

* 12. Hen. VII. 17. H H 2 sad Rao

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which I suppose to have been a reading on the statute 13 Hen. IV. His opinion was, "that the "justices of the peace, sheriff or under sheriff, "ought to have the aid and affistance of all "knights, gentlemen, yeomen, labourers, ser-"vants, apprentices, and likewise of wards, and "of other young men above the age of sisteen "years; because all of that age are bound to "have barness, or armour, by the statute of "Winchester*."

What effect the fubfequent repeal of the statutes of armour might have on the reason affigned by Mr. Marrow for his opinion, it is needless to inquire; for it seems obvious, that the flatutes of JAMES I. removed the necessity only, and not the propriety, of having arms, or, to use the very words of the old act, armure pur la pees garder; and the doctrine in Lambard is generally understood to be law . The passage abovecited appears, however, to have misled the great commentator on the laws of England, who feems to have collected from it, that none were bound to obey the summons of the sheriff, but persons under the degree of nobility; whereas the patent of affishance, cited by Dalton , commands barons, earls, and dukes, to be auxiliantes et re-

^{*} Lamb. Eiren. 316.

[†] Dalt. c. 95.

^{‡ 1} Comm. 344. 4 Comm. 122.

^{||} C. 1.

fpondentes to the sheriff in all things belonging to his office.

The power of the county, therefore, includes the whole civil state, from the duke to the peafant; while the military state, as fuch, forms no part of that power, being under a different command, and fubject to a different law; but, as every foldier in England is at the same time a citizen, he is authorized and perhaps bound, when under no particular orders or at no particular station, to exert himself, like any other good fubject, in the suppression of tumults the prevention of felony, and the apprehension of the rioters or felons. This I mean: when the foldiery, not being upon military duty, happen to be present at a riot, and in their civil capacity forcibly fuppress it, their act is not only legal but laudable; and the colour of their clothes, or the nature of their arms, make no kind of difference; but, when they are in truth called out by the executive magistrate, and are in fact no more than instruments in the hands of their commanders, their acts can only be justified by that NECESSITY which always defends what it compels, which for the time superfedes all positive law, but of the real existence of which their country must afterwards judge, unless the legislature fhould, in their wisdom, be pleased to declare it. For this distinction I can produce no written auAL ICEAFFA

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thority; but it feems consonant to reason as well as truth.

This power of the county, of which we may now begin to form a distinct idea, is mentioned, as well known and well understood, in a variety of statutes, which were confirmatory of the common law; and some parts of which I shall cite in the original languages, how barbarous or inelegant soever they may appear to a classical eye.

The stat. Westm. 1. c. 17. ordains "qe le vis-" counte ou le bailiff, prise ove luy poyer de son " countee, ou de sa baille, voit essayer de faire le " plevin des averes a celuy qe prit les averes." And that of Westm. 2. c. 39. is more peremptory in cases of resistance to the execution of civil process: "Multoties etiam dant responsum, " quod non potuerunt prosequi præceptum regis copropter resistentiam potestatis alicujus magna-" tis, de quo caveant vicecomites de cætero, quia " hujusmodi responsio multum redundat in de-" decus domini regis; et, quam citò ballivi sui " testificantur, quòd invenerunt hujusmodi re-" fistentiam, statim omnibus omissis, assumpto " secum posse comitatús sui, eant in propriâ per-" fonâ ad faciendam executionem." By the 17 Rich. II. c. 8. it is enacted, that, in case of any tumult or disorder, "a pluis tost qe viscontz " et autres ministres le roi poent ent avoir

"coniffance, ove la force del countee et pais, ou itiel cas aviegne, ilz mettent destourbance encontre tiel malice ove tout lour poair, et preignent tielx messesours, et les mettent en prisone tanque due execution de leie soit sait de eux, et que touz seignurs et autres liges du roialme soient entendantz et aidantz, de tout lour force et poair, as viscontz et ministres avant ditz."

Again: by the 13 Hen. IV. c. 7. "Ordeig-" nez est et establiz, qe, si aucun riot assemblee " ou rout des gentz encontre la loie se face en "aucune partie del roialme, les justices de paix, " trois ou deux de eux a meyns, et le viscont " ou fouth viscont del countee, ou tiel riot assem-" blee ou rout se ferra enapres, veignent ove le " poair del countee, si besoigne serra, pur eux " arefter, et eux areftent." In the construction of this last statute it has been holden*, that, although it speak of three or two justices at least, yet one justice may raise the power and suppress a riot; for it is a beneficial law, faid Fineux, and was enacted for the prevention of mischief, which might ensue, if a justice were to wait for others. It has also been adjudged, that, under the word ministers, in the stat. 17 Rich. II. c. 8. justices of peace are comprised i; and so are constables,

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^{* 14} Hen. VII. 10. Crompt. 46. b. † Crompt. 46. a.

by the opinion of Fitzberbert cited by Crompton, and confirmed by the Year book 1 Hen. VII. 10; where it is laid down, that "conftabularii "villæ super affraiam possunt levare populum."

We may therefore conclude, that, in all cases of tumult and infurrection, the sheriff, or other minister, may and ought to make proclamation, commanding all fuch persons, as constitute the power of the county, to affemble and affift him*; or he may fend a particular warning or fummons, for the same purpose, to every individual of the posse, who must attend such summons under pain of a heavy fine and imprisonment; for, by the stat. 2 Hen. V. c. 8. it is provided, " ge " les lieges du roi esteantz sufficeantz pur tra-« vailler en le countee, ou tielx routes assemblez " ou riotes sont, soient affistantz as justices, com-" missioners, viscont, et soutz-viscont, de mesme " le countee, qant ilz serront reasonablement " garniz, pur chivacher, ove les ditz justices, commissioners, et viscont ou soutz-viscont en " aide de resistence de tielx riotes routes et af-" femblez fur peine demprisonement et faire fyn " et ranceon al roi:" And the offence of neglecting to join the power of the county, after fuch reasonable warning, is ranked by Sir William

^{*} Dalt. c. 95.

Blackstone under the class of contempts against the king's prerogative*.

Having fixed our ideas concerning the nature of this legal power, the mode of raifing it, and the punishment of a criminal neglect to join it, let us consider, first, by the help of reason only, what corollaries necessarily follow the doctrine, which we have expounded; and, next, inquire whether authority and reason, which lord Coke justly calls the two faithful witnesses in matter of law+, coincide on the question before us; as they indubitably will, unless either our previous ratiocination be illogical, or the minds of ancient and modern lawyers have taken a bent from the prejudices of their respective ages.

From the obligation of the sheriff, or other minister, to assemble the power of his county for the suppression of any rebellion, insurrection, riot, or affray, and for the repelling of invading enemies; from the duty incumbent on every man of sufficient years and strength to affociate himself with the power so assembled, and from the principles of natural justice, which will neither require men to do impossible things, nor refuse them the means of performing what they are commanded to perform; from these obligations and these principles it instantaneously follows: First;

* 4 Com. 122. † 1 Inst. Pref.

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That the sheriff or other peace-officer is bound to raise *such* a power as will effectually quell the tumult either really existing or justly seared.

Secondly; That the power so raised may and must be armed with such weapons, and act in such order, as shall enable them totally to suppress the riot or insurrection, or to repel the invaders.

Thirdly; That, in the use of such weapons, the power may justify the charging, wounding, or even killing, the rioters or insurgents, who persist in their outrages, and resuse to surrender themselves.

Fourthly; That the power of every county ought at all times, but especially in times of danger, to be *prepared* for attending the magistrate, and to know the *use* of such weapons, as are best adapted to the suppression of tumults.

Fifthly; That, fince the mushet and bayonet are found by experience to be the most effectual arms, all persons, who constitute the power of a county, are bound to be competently skilled in the use of them.

Sixthly; That, fince the only fafe and certain mode of using them with effect is by acting in a body, it is the duty of the whole civil state to know the platoon-exercise, and to learn it in companies.

As no authority, according to Charron, can ftand without reason, so we find, by constant experience, that no reason can surmount the passions and prejudices of men without the aid of authority; and I am happy in believing, that both of them perfectly coincide in support of the foregoing propositions: first, therefore, I shall prove them by citing cases, which have been solemnly adjudged, together with the opinions of learned lawyers, whose works are much respected in our courts of justice; and, next, I shall inquire, whether those cases and opinions have been over-ruled or shaken by any subsequent decisions, or acts of the legislature.

The earliest resolution upon the subject, that has occurred to me, was in a case, which the very learned and judicious Brook thought worthy of note* in his time, and which, in the present time, deserves peculiar attention. It is reported in French in the first page of the Year book 3 Hen. VII. and it is manifestly the same with that afterwards abridged in an impersect Latin note printed, out of its place, in the tenth page of the same book; though Brook seems to have considered them as different, or rather not to have observed their identity; for, in the title of his Abridgement just alluded to, he gives them

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^{*} Bro. Abr. tit. Office et Officer. 23.

in feparate articles, without melting both parts of the Year book together, as I propose to do; by which means I shall extract the whole case and form one consistent state of it.

TOHN DEINS had been outlawed in the county of Suffolk for felony; and, having brought a writ of error to reverse the outlawry, had obtained a Non Molestando, which he delivered to the escheator, John Lenthorp; who, neverthelefs, seised and took away his effects. Upon this, Deins replevied; and EDMUND BEDINGFIELD, the sheriff, issued his precept to Thomas Gire, his bailiff, jurus et conus, together with Roger Hopton, Edmund Heningham, and three other persons, directing them to take the goods of the plaintiff out of the escheator's possession: accordingly, the bailiff and his party took forcibly from Lenthorp an hundred sheep, which they delivered to Deins; and, in order to make delivery of the goods and cattle which remained, they affembled all the inhabitants of five adjacent vills; who, in number three hundred, arrayed in a warlike manner, and armed with brigandines, jackets of mail. and GUNS, united and affociated themselves, and marched* to the place where the cattle were detained; but did not proceed to any other act of violence.

^{*} Modo guerrino arraiati se univerunt et associaverunt, et iter suum arripuerunt, 3 Hen. VII. 1. 10.

For this imagined breach of the peace, and military array, an indictment was preferred in the King's Bench against the plaintiff in replevin, the sheriff and his bailiff, and the persons who had assisted them; but the court unanimously adjudged, that the indictment was void; founding their judgement, as it seems, on the reasons advanced by serjeant Keble, whose argument it may be proper to state at large.

"As to the plaintiff in replevin, faid he, no wrong was committed by him; for the escheator, when he took the goods, after the Non Molestando had been delivered to him, acted unlike an officer; since it was his duty, in that instant, to surcease his process: Deins, therefore, was perfectly justified in complaining to the sherist, and must consequently be differented from this indictment.

"Nor did the sheriff transgress his duty in executing the replevin; for, when the party came
to him, he could not know, whether he was an
outlaw or not; or whether or no the escheator
had seised the cattle in the King's right; which
ought to have been shown by the King's officer. The bailiff too must be discharged; for
the servant is in the same condition with the
master; and, as the sheriff cannot do every
thing himself, his deputy must have the same
power with him.

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"In regard to his affembling three hundred men, that was no illegal act*; for every man is bound to affift the sheriff and his bailiff; to fupport him in executing the King's writs; and to give him aid in all cases of need; and this by common law and common reason, not-withstanding the statutes of Westminster the first and second. So, if any man resuse to asif the sheriff at his request, he shall be fined, whether it be to execute process, or to apprehend selons."

The Court agreed, that the bailiff had as good a right to raise the power as the sheriff himself; because it is all one office and one authority.

It was urged, "that, if men affemble with arms and do nothing, it shall be intended, that "they affembled with a bad design;" but it was answered, that in some cases the presumption might be just; in others, not: thus the use of armour on particular occasions, as on Midsummer eve in London, and at other times for sport, is not punishable; and, here, the cause of the affembly appears, namely to execute a replevin. Even if they had acted, yet their affembly was lawful in the beginning; and such affemblies are not illegal as are not to the terror of the people of

^{*} Ceo nest incontre la ley: So Brook reports his werds, tit. Riots, 2.

our lord the king; which words ought to be in every indiament for an unlawful affembly.

Another point was touched upon by the king's ferjeants: "that the sheriff cannot take with "him so many armed men, but only a reasonable "party;" to which it was answered, that, if he were so restrained, he might be in great jeopardy and peril of his life; and for this reason, he may take as many as he pleases at his own discretion.

Lastly, it was argued on the statute of Westm. 2. c. 39*, that the sheriff might raise the power of his county after complaint made, and not before; but the judges held, that he might raise it before by the common law.

This case (which, for convenience in citation, I shall call Beding field's Case), is irresistibly strong in support of my first and second corollaries; for, although there seems to have been some doubt at sirst in the minds of the judges, as it was merely the execution of civil process, yet, if the armed men had marched in array for the purpose of apprehending felons, there would have been no debate on the legality of the act; and, after an argument at the bar, the former doubt was entirely removed.

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^{*}The statute of Marlbridge, c. 21. seems here to be meant; the words post querinoniam sactam not being used in stat. Westm. 2.

The next is the case of a riot at Drayton Basset in Staffordsbire, determined in the Star-chamber in the twenty-fourth of Elizabeth, and cited more than once by Crompton*; who fays that the court refolved, 1. That, if the two justices, nearest to the place where the riot is committed, do not act as they are required by stat. 13 Hen. IV. c. 17. each of them shall pay an bundred pounds; and the other justices of the same county, where the tumult was, shall be fined for not suppressing it, if there was any default in them. 2. That the sheriff and justices of peace may take as many men in armour as are necessary, WITH GUNS, and fo forth, and kill the rioters, if they will not yield themselves; for the stat. 13 Hen. IV. c. 17. fays, that they MUST arrest them; and, if the justices, or any of their company, kill any of the rioters, who will not furrender themselves, it is no offence in them.

This case of Drayton Basset, which is also cited and approved by Sir Matthew Halet, incontestably demonstrates my third corollary.

In the 34th or 43d of Elizabeth (for the date is differently reported by some transposition of the figures) the doctrine in Bedingfield's case

^{*} Crompt. 46. b. 124. b.

^{† 1} H. P. C. 495.

was fully recognized and established by the decifion in the case of St. John*, or Gardener; which, being subsequent to the stat. 33 Hen. VIII. c. 6. prohibiting the use of band-guns, clearly shows, that no alteration in the ancient law was made by that prohibition.

The case was this: Gardener had obtained a judgement against St. John, and procured a writ of execution directed to the sheriff of Bedford, who made a warrant to Gardener's own brother as a special bailiff; but, resistance being justly feared, the bailiff armed himself with a dagge, or short gun. It happened that St. John was a justice of peace for Bedfordsbire, and seems to have had that little learning, which, in law rather more than in poetry, is a dangerous thing, especially when it is coupled with knavery; for, having notice how the bailiff was armed, he contrived to have him seised by his servants, and brought before himself as the next justice; when, by colour of his office and the statute of Henry VIII. he committed the officer, who came to arrest him, until he should pay ten pounds, one moiety to the queen, and another to the informant. The bailiff having removed himself by babeas corpus, and the whole matter being disclosed to the court, it was refolved, "that the sheriff or any of his mi-

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^{* 5.} Rep. 71. 72. † Cro. Eliz. 821, 822. VOL. VI. 1 1

"nisters, in execution of justice, may carry "dagges or band-guns, or other weapons inva"five or defensive, the same not being restrained by the general prohibition of the statute; for, if it were, no justice would be aaministered."

By stronger reason such weapons may be carried for the purpose of suppressing riots, apprehending felons, or repelling invaders. It may here be observed, that the statute of Hen. VIII. was enacted for the prevention of mischief, that might be occasioned by the use of little bandguns, which might be carried secretly and kill on a sudden; but guns of a proper length were not prohibited.

The Case of Arms, or Burton's case, next presents itself to our examination: it is of very high authority, and so apposite to the object of our inquiry, that I shall make no apology for citing it in the very words of the learned reporter*: "Upon an assembly of all the justices" and barons at Serjeant's Inn this Easter term (39 Eliz.), on Monday the 15th of April, this question was moved by Anderson, Chief Justice of the Common Bench; Whether men may arm themselves to suppress riots and rebellions, or to resist enemies, and endeavour of themselves to suppress or resist such disturbers of the peace and quiet of the realm; and, upon good deli-

^{*} Poph. 121, 122.

66 beration, it was refolved by them all, that every "justice of peace, sheriff, and other minister, or "OTHER SUBJECT OF THE KING, where fuch " accident happens, may do it; and, to fortify " this their resolution, they perused the statute of " Northampton, 2 Edw. III. c. 3. which enacts, " that none be so hardy as to come before the king's " justices or other ministers of the king in the ex-" ecution of their office with force and arms, nor to " bring force in affray of the peace, or to ride or go " armed by night or day, EXCEPT the servants of " the king in his presence, or the ministers of the " king in the execution of his precepts, or of their " office, and those who are in their company affift-66 ing them, OR UPON CRY MADE FOR WEA-" PONS TO KEEP THE PEACE, and this in " places where accidents happen, upon the pe-" nalty in the same statute contained; where-" by it appeareth, that, upon cry made for wea-" pons to keep the peace, EVERY MAN, where " fuch accidents happen, for breaking the peace, " may by law arm bimfelf against such evil-doers; " but they took it to be the more discrete way for " every one in fuch a case to be affistant to the "justices, sheriffs, or other ministers of the king " in the doing of it."

Highly as the authority of Sir John Popham deserves to be respected, it is to be wished, that Lord Anderson himself had given us a full account

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of his own opinion with that of the other judges; but he has left us no more than a short note* to the same effect with the preceding report. This case also is cited by Hale-i, and the very words in Popham are transcribed by Sir John Kelyng in his report of Lymerick's caset. I think it a strong proof of my fourth corollary, respecting the necessity of being prepared at all times to keep the peace; but, if a particle of doubt on that head can remain, it will be diffipated at once by the flatute of Westm. 1. c. 9. by which, as it is cited by Cromptons, "purveu est, qe touz con-" tinualment soient prestez et apparaillez al maun-" dement et al fomons des viscountes, et al crye " del pais de suire et darester felons, qant mestier " ferra, auxibien dedeins fraunchises come de-"hors; et ceux, qe ceo ne ferront, et de ceo " foient atteintz, le roi prendra a eux grave-" ment;" whence it should feem, that ALL SUB-IECTS, who are not continually prest, or ready, for the orders of the sheriff on an alarm in the country, are exposed to the royal displeasure and to a fevere penalty; and the word prest (which in modern times has been either ignorantly or intentionally confounded with the participle paffive of the verb to press) is used for prepared by Chief Justice Finieux in a passage before cited:

^{* 2} And. 67. † 1 H. P. C. 53. ‡ Kel. 76. § 124. 2.

I am aware, however, that communialment is the usual reading; which will give a sense rather less forcible, "that all men generally shall be "ready and accoursed at the summons of the "sheriff;" but this amounts to the same thing; for how can a man be armed and apparelled in an instant on a sudden alarm, unless his weapons and accoursements were previously at hand?

The opinions of the learned, which form the fecond branch of my proofs, can add little weight to four cases of such authority, as those of Bedingfield, Drayton Baffet, St. John, and the Case of Arms: indeed, these cases seem to have been the guides of Lambard and Dalton, Hale and Hawkins; who all agree, that "it is referred to " the discretion of the sheriff, under-sheriff, or " other person authorized to raise the posse, how " many men they will affemble, and how they " shall be armed, weaponed, or otherwise furnished " for the business*;" that " private persons may " arm themselves in order to suppress a riot, and " that all, who attend the justices in order to guell a tumult, may take with them fuch wea-" pons as shall enable them to do it effectually+; " that, laftly, in executing process or apprehend-"ing rioters, they may, by the common law,

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^{*} Lamb. Eiren. 317. Dalt. c. 95. + 1 Hawk. P. C. c. 65.

"beat, wound, or kill, any of the opponents or "infurgents, who shall resist them";" all which opinions are supported by solemn decisions, and are, in truth, the conclusions of natural reason from the simplest and surest premisses.

The fifth and fixth propositions, which I confider as fimple corollaries, are founded in part on extrinfick assumptions, drawn from history and experience: they may therefore, even by the rules of law, admit of proof from the authority of men, "quibus in arte fuâ credendum est;" and the following citation from Mr. WIND-HAM's elegant introduction to his Plan of Difcipline for the Norfolk Militia will be thought as convincing as any passage in Fitzherbert or Brook. "About the beginning of this century, " fays he, the troops in Europe were univerfally " armed with firelocks; to which, much about " the same time, the bayonet being added, pikes " also were laid aside. When the use of firearms began to be generally established, the ne-" cessity of a great regularity and uniformity, in " the manner of using those arms, became appa-" rent: it was foon discovered, that those troops, " which could make the brifkeft fire, and fustain "it longest, had a great superiority over others " less expert; and, likewise, that the efficacy and

^{*} Lamb. Eiren 318. 1 Hale, H. P. C. 495.

copower of fire did not consist in random and scat-" tering shots made without order, but in the fire " of a body of men at once, and that properly timed " and directed. It was therefore necessary to ex-" ercife the troops in loading quick, and firing to-" gether by the word of command; but, as the "aukwardness, carelessness, and rashness, of " young foldiers (if left to themselves) must oc-" casion frequent accidents, and the loss of many " of their own party, by the unskilful manner of " using their fire-arms, especially in the hurry of " an engagement, it became a matter of indispen-" fable necessity to teach soldiers an uniform me-" thod of performing every action that was to be "done with the musket, that they might all do " it in the most expeditious and safest manner."

Should any doubt be raifed as to the legality of assembling for this purpose, and should the words of Sir Matthew Hale, whom of all men I respect the most, be opposed to me, that, "where people are assembled in great numbers armed with weapons offensive, or weapons of war, if they march thus armed in a body, if they have chosen commanders or officers, if they march cum vexillis explicatis or with drums or trumpets, and the like, it may be considerable, whether the greatness of their numbers, and their continuance together doing these acts, may not amount to more guerrino

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" arraiati, or a levying of war*," which may be construed an encroachment on the prerogative of the crown+; the answer is no less obvious than decisive, in the language of BRACTON, that, Voluntas et propositum distinguunt malesicia; that, the intent being good, the act cannot be bad; and that Beding field's case is an express authority for the legality of " marching armed in a body " more guerrino arraiati," even for the purpose of executing a civil process, to which there is just expectation of violent resistance. So neceffary, indeed, is order and discipline in directing the exertions of an armed affembly, that the statutes 3 and 4 Edw. VI. c. 5. and 1 Mary, c. 12. (which are no longer in force, but were the models of the well-known riot-act) expressly authorize the sheriffs, justices, mayors, and bailiffs, " to raife power and array them in manner of war " against the rioters:" and here I may again apply those found maxims, to which I before alluded: 1. That the law requires no impossible things; but it is impossible to join the power and suppress a riot effectually, without being at least moderately skilled in the use of fire-arms, and ready in the common evolutions. 2. That, when the law permits or enjoins the performance of any act, all the means of performing it are also

^{* 1} H.P.C. 131. + 3 Inft. 9. ‡ L. 3 c. 14 § 13.

permitted or enjoined; but the law doth permit and command every fubject of this realm to arm himself and use his arms with effect for the suppression of tumults: the conclusion, in both forms of reasoning, follows too closely and too evidently to admit of a doubt.

That the four cases, on which I have relied, have never been shaken by any later decision, appears from the uniform recognition of their authority by the best modern writers: indeed, nothing less than an act of the legislature could justly over-rule unanimous and well-considered resolutions; but no act whatever has in any degree affected them; and the common law, which in general is the perfection of human wisdom, happily in this instance has stood like a rock amid the conflict of statutes rolling upon statutes.

Neither of the statutes of Westminster had any effect on the decision in Beding field's case; nor was that of St. John at all influenced by the subsequent prohibition of hand-guns; nor the Case of Arms by the statute of Northampton; and though the act of queen Mary was continued during the life of Elizabeth, yet Sir Matthew Hale observes, that, "the case of Drayton Basset was not within that statute, nor de"pending on it*." In the same manner serjeant

* 1 H. P. C. 495.

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Hawkins remarks, in conformity to Hale and to reason, which will very seldom be found at variance, "that the stat. I. Geo. I. c. 5. commonly "called the riot-act, being wholly in the affirm-" ative, cannot be thought to take away any part "of the authority in the suppressing of a riot, "which was before that time given either to "officers, or private persons, by the common law "or by statute*."

Having shown the nature and extent of the Posse Comitatuum, and proved that it is required by law to be equal in its exertion to a well-disciplined army, I have established the proposition, which I undertook to demonstrate; "That the common and statute laws of the realm, in force at this day, give the civil state in every county apower, which, if it were perfectly understood and continually prepared, would essectually quell any riot or insurrection, without assistance from the military, and even without the modern riot-act."

One fide, therefore, of the diffressing alternative, to which I was reduced, concerning the precariousness of English Freedom; is happily removed; but the other fide remains, "that our laws have been disgracefully neglected, and ought to be restored to full vigour and energy."

^{* 1} P. C. c. 65. † P. 466. ‡ P. 464.

To what fatal cause must we ascribe a neglect so shameful and so dangerous? I answer boldly, yet, I hope, without arrogance, fince I use the very words of BLACKSTONE, " to the vast ac-" quisition of force arising from the riot-act and "the annual expedience of a standing army";" which has induced a disposition, cherished by the indolence natural to man, and promoted by the excessive voluptuousness of the age, to look up folely for protection to the executive power and the foldiery; a disposition, which must instantly be shaken off, if any spark of virtue remain in our bosoms; for, although we are happy in a prince, who "will never harbour a thought or " adopt a perfualion in any the remotest degree "detrimental to the liberty of Britain+," yet in free states a military power must ever be an object of jealoufy; and, fince our excellent constitution will be claimed by our posterity as their best inheritance, we must act with a provident care, left, two centuries hence, the fable of the horse should be verified in our descendants, who may be in need of protection against their protectors, and be forced to carry barnefs, notwithstanding the repeal of the statute of Winchester.

For the history of the riot-act, so laboured and

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^{* 4} Comm. 434. † 1 Bl. Comm. 337.

so ineffectual, I must refer my reader to the incomparable author, whom I so frequently cite, the commentator on the laws of England; who expresses his jealousy and disapprobation of it with no less delicacy than wisdom*: in respect to the number of capital felonies created by it, which Blackstone seems highly to have disapproved, I shall fay nothing, as it is not my prefent fubject; but I may, with all due reverence for the legislature in the first year of GEORGE the First, observe, that the act was a bad copy of a bad model, the statute of Mary; that there feems to have been no occasion to make it perpetual, much less to enlarge it; that it is in some parts liable to dangerous misinterpretation; that it has been found wholly inadequate to the end proposed by it; and that the third clause of it was in great measure unnecessary, as it only affirms our ancient law, which had pretty well guarded "against any violent breach of the peace ." Confirmatory statutes are always attended with the danger of superseding the use, and obliterating the remembrance, of the common law, which they confirm, and which the wisdom of ages had before fufficiently established.

As to the best mode of restoring our laws to their full vigour and energy, and of providing for

^{* 4} Comm. 143.

^{+ 4} Bl. Comm. 147.

our future defence, I shall certainly submit it to the discretion of my countrymen who are bound by those laws; and shall only suggest to them the following plan; after premising, in the words of ferjeant Hawkins, " that, although " private persons may arm themselves in order to " fuppress a riot, and may consequently use arms " in the suppressing of it, if there be a necessity " for their fo doing; yet it feems to be extremely "hazardous for private persons to proceed to " those extremities in common cases, lest, under " the pretence of keeping the peace, they cause a "more enormous breach of it; and, therefore, " fuch violent methods feem only proper against " SUCH RIOTS AS SAVOUR OF REBELLION, for "the suppressing of which no remedies can be " too fevere"."

THE PLAN.

I.

Let all such persons in every county of Eng-LAND as are included in the power of that county, and are of ability to provide themselves with arms, and pay for learning the use of them, be furnished each with his musket and bayonet, and their necessary appendages.

* 1 Hawk. P. C. c. 65.

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II.

Let feveral companies be formed, in every county, of fixty fuch men or more, voluntarily affociated for the fole purpose of joining the power, when legally summoned, and, with that view, of learning the proper use of their weapons, street-siring, and the various evolutions necessary in action.

III.

Let the companies be taught, in the most private and orderly manner, for two or three hours early every morning, until they are competently skilled in the use of their arms: let them not, unnecessarily, march through streets or high-roads, nor make any the least military parade, but consider themselves entirely as part of the civil state.

IV.

Let each member of a company, when he has learned the use of his arms, keep them for the defence of his house and person, and be ready to join his company in using them for the suppression of riots, whenever the sheriff, under-sheriff, or peace officer shall raise the power, or there shall be a cry made for weapons to keep the peace.

V.

Let the caution, prefixed to this plan, be di-

ligently observed, and the law, contained in the preceding citations, be held ever sacred: nor letany private person presume to raise the power of the county*, which is the province of the sheriff, under-sheriff or magistrate; although a cry for weapons to keep the peace may be made in cases of extreme necessity, and in them only, by private persons.

VI.

If any mark of distinction in dress shall be thought expedient, that the several companies may know each other, in the forcible suppression of a riot, let such a regulation be severally referred, with any other rules that may be necessary, to a committee chosen out of each company.

The great advantages of fuch affociations are fo apparent, that I shall forbear at present to expatiate on them; but shall be satisfied with applying to them what Pulton says of the old tilts and justs, "that the cause, beginning, and "end thereof do tend do the laudable exercise of "true valour and manhood, and to the encou-"ragement and enabling of the actors therein to defend the realm and the peace thereof;" and with observing, in the words of the stat. 33.

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^{* 1} Hale, H. P. C. 601. + De Pace, 25. b.

Hen. VIII. c. 6, that the musket may now be made, what the long bow was formerly, "the "furety, safeguard, and continual defence, of "this realm of *England*, and an inestimable "dread and terror to the enemies of the same."

Objections will certainly be raifed; for who can propose a measure, however falutary, to which no man will object? I expect them, however, chiefly from those, whose indolence may induce them rather to feek protection from a power able to crush them, than to protect themfelves by joining a power provided by free and equal laws; or from those, who, as MILTON fays, " have betaken themselves to state-affairs " with fouls fo unprincipled in virtue and true "generous breeding, that flattery, and court-" fhifts, and tyrannous aphorisms, appear to "them the highest points of wisdom." To such men it will be sufficient to give this general anfwer; that, as there is no necessity of applying either to the executive, or to the legislative, power for permission to obey the laws, we are not to debate on vague notions of expedience, groundless jealousies, or imaginary consequences: the fole question is, "whether the doctrine ex-" pounded in these pages be law;" if it be, there is no room for deliberation, fince it is a maxim, that no man must think himself wiser than the law, which is the gathered wisdom of many ages; and to favourable is the common law of ENGLAND to the rights of our species, which it is unhappily become the fashion to deride and vilify, that, if any man will broach a position in favour of genuine, rational, manly freedom, I will engage to supply him with abundant authorities in support of it.

I persuade myself, that infinite good must refult from the general adoption of my plan; and that no possible evil can be mixed with it, as long as the cautions and restrictions before suggested shall be duly observed, and our excellent constitution be kept in its just balance at that nice point, which is equally removed from the pernicious extremes of republican madness, ariftocratical pride, and monarchical folly; nor have I any scruple to confess, that, as every foldier in ENGLAND is at the same time a citizen, I wish to fee every citizen able at least, for the preservation of publick peace, to act as a foldier: when that shall be the case, the LIBERTY OF BRITAIN will ever be unaffailed; for this plain reason—it will be unasfailable.

The fecurity, and confequently the happiness, of a free people do not confist in their belief, however firm, that the executive power will not attempt to invade their just rights, but in their consciousness that any such attempt would be wholly ineffectual.

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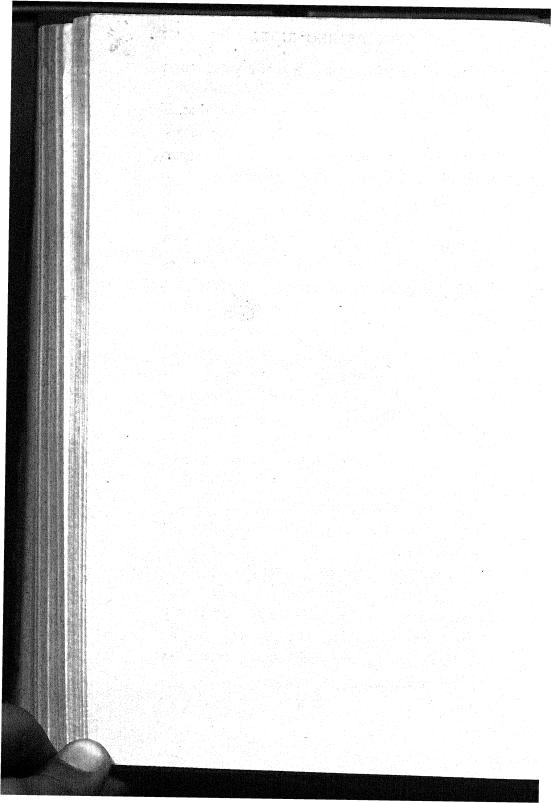
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Ahmed Karim

Sharma, PVSM. /

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SPEECH

TO

THE ASSEMBLED INHABITANTS OF

THE COUNTIES OF

MIDDLESEX AND SURRY,

THE CITIES OF

LONDON AND WESTMINSTER,

AND THE BOROUGH OF

SOUTHWARK.

EXVIII MAY, M.DCC.LXXXII.

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ADVERTISEMENT.

HAVING been informed, that parts of my Speech on the 28th of May at the London Tavern were thought obscure, yet important, I have endeavoured to recollect what I then took the liberty to say, and have consented to let the argument go abroad in its rude and unpolished state. What offence this publication may give, either in parts or in the whole, is the last and least of my cares: my first and greatest is, to speak on all occasions what I conceive to be just and true.

SPEECH

ON

THE REFORMATION OF PARLIAMENT.

MY LORD MAYOR,

SO far am I from rising to intimate the slightest shade of diffent from this respectable and unanimous affembly, or the minutest disapprobation of the two resolutions proposed, that I despair of finding words fufficiently strong to express my joy and triumph at the perfect harmony, with which the first of them has already passed, and to which the fecond will, I trust, be thought equally entitled: but, on the last reading of the proposition now before you, it struck me, that, although it was in fubstance unexceptionable, yet it might eafily be improved in form by the infertion of two or three words referring to the preceding refolution, and thus be rendered more conducive to our great object of generally declaring our concurrent fense, and avoiding any chance of disunion upon specifick points. Every AL ENCEAFFA

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proposition, intended to meet with universal concurrence, ought to have three distinguishing properties; it should be just, simple, comprehensive: without justice, it will be rejected by the wife and good; without fimplicity, it will involve complex matter, on which the wifest and the best may naturally differ; and without comprehenfiveness, it will never answer any purpose of consequence and extent. The first resolution, "that petitions ought to be prepared for a more " complete representation of the people," has all of these properties in an eminent degree: it is so just, that, if this meeting had been ten times as large, there would not have been one diffentient voice on that ground; fo fimple, that it affords no scope or subject for cavil; so comprehensive, that, when the house of commons have the petitions before them, it will give room for every particular plan, which the ingenuity of any member, duly tempered by wisdom, yet actuated by true patriotism, can suggest.

Ought not the fecond proposition, "that the "fense of the people should be taken this sum-"mer in order to prepare their feveral petitions," to be somewhat restrained in the generality of the expression? It is just, but rather too comprehensive: the fense of the people is a phrase of measureless compass, and may include their several opinions, however specifick, however dif-

cordant. This is the very evil, which we are anxious to prevent; fince we all agree, that no particular mode of reformation should be prescribed to the house, lest they should reject, for no other reason, some good plan, which, if left to the operation of their own minds, they may probably adopt. Might not the sentence be thus corrected, "that the fense of the people should " be taken on the preceding resolution?" But this I offer as a mere fuggestion to wifer heads, and will not trouble the affembly by shaping it into a motion: indeed, if both refolutions be taken together, and it be understood, that we mean to recommend petitions on the general ground, in order to shun that fatal rock, diversity of sentiment on particulars, I desire no more, and am very little folicitous about accuracy of expression; hoping at the same time, although the five circles here affembled have no right or pretension to take the lead in the nation, yet that the other counties, districts, and towns in Great Britain will approve our idea, and not disdain to follow our example: in that event I smile at the thought of a miscarriage, and am confident, that, with concurrence, perseverance, and moderation, the people of England must prevail in a claim so effential to their liberty, and to the permanence of an administration, who profess to govern with their confidence.

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Here I should regularly cease; especially, as I now labour under the pressure of the epidemical complaint, which alone can have prevented this meeting from being as numerous as it is respectable: it could not prevent my attendance, for, in health or in sickness, I am devoted to your service; and I shall never forget the words of an old Roman, Ligarius; who, when the liberties of his country were in imminent danger, and when a real friend to those liberties was condoling with him on his illness at so critical a time, raised himself on his couch, seised the hand of his friend, and said, If you have any business worthly of yourselves, I am well.

It was not in truth my defign to have spoken at all this evening; but, since I have risen to explain a sudden thought, I will avail myself of your favourable attention, and hazard a few words upon the general question itself: on the smallest intimation of your wishes, I will be silent. Numbers will have patience to hear, who have not time to read; besides, that it is always easier to speak than to write; and, as to myself, a very particular and urgent occasion, which calls me for some months from England, will deprive me of another opportunity to communicate my sentiments in either form, until the momentous object before us shall be made certainly attainable through the concord, or for ever lost

and irrecoverable through the disagreement, of

The only *specious* argument, that I have anywhere heard, against a change in the parliamentary representation of the people, is, that, a constitution, which has stood for ages, ought not to be altered."

This objection appears on a superficial view so plausible, and applies itself so winningly to the hearts of Englishmen, who have an honest prejudice for their established system, without having in general very distinct ideas of it, that a detection of the fophism, for such I engage to prove it, becomes absolutely necessary for the promotion of your glorious enterprise.

I will risk your impatience; for, though I am aware, that allusions to history and interpretations of old statutes are not very proper in addresses to popular assemblies; yet, when popular assemblies take upon them, as they justly may, to act and resolve upon constitutional points, they are bound to seek or to receive information, lest their actions should be rash and their resolutions ill-founded. A power exerted through passion or caprice, without a deep knowledge of the business in hand, and a fair application of the intellectual faculties, is a tyrannical power, whether it be regal, aristocratical, or popular; and the prevalence of any such power, by the overbearing

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strength of king, nobles, or people, would form an immediate tyranny, and in a moment subvert the constitution.

That constitution, which, I persuade myself, will not be subverted, consists of form and spirit, of body (if I may so express myself), and of foul: but, in a course of years, the form is apt to deviate fo widely from the spirit, that it becomes expedient almost every century to restore its genuine purity and loveliness. The objection, which I undertake to remove, is fophistical, either by defign or through ignorance; for the proposition is true in one sense of the word confitution, and false in the other; and the sense, in which it is true, is inapplicable to the question. It is true, that the spirit of the constitution ought not to be changed: it is false, that the form ought not to be corrected; and I will now demonstrate. "that the spirit of our constitution requires a " representation of the people, nearly equal and " nearly universal." Such as cannot or will not follow me in the premisses, both can and will (or I greatly deceive myself) bear away the conclufion in their memory; and it is of higher importance than they may imagine.

There has been a continued war in the constitution of *England* between two jarring principles; the evil principle of the feudal fystem with his dark auxiliaries, ignorance and false philoso-

phy; and the good principle of increasing commerce, with her liberal allies, true learning and found reason. The first is the poisoned source of all the abominations, which history too faithfully records: it has blemished and polluted, wherever it has touched, the fair form of our constitution, and for ages even contaminated the spirit. While any dregs of this baneful system remain, you cannot justly boast of general freedom: it was a fystem of niggardly and partial freedom, enjoyed by great barons only and many acred men, who were perpetually infulting and giving check to the king, while they racked and harrowed the people. Narrow and base as it was, and confined exclusively to landed property, it admitted the lowest freeholders to the due enjoyment of that inestimable right, without which it is a banter to call a man free; the right of voting in the choice of deputies to affift in making those laws, which may affect not his property only, but his life, and, what is dearer, his liberty; and which are not laws, but tyrannous ordinances, if imposed on him without his fuffrage given in person or by deputation. This I conceive to have been the right of every freeholder, even by the feudal polity, from the earliest time; and the statute of HENRY IV. I believe to have been merely declaratory: an act which passed in the seventh year of that prince, near

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they, who are present at the county court, as well suitors duly summoned for the same cause, as others, shall proceed to the election of their knights for the parliament." All suitors, you see, had the right; and all freeholders were suitors in the court, however low the value of their freeholds. Observe all along, that one pound in those days was equal to ten at least in the present time. Here then is a plain declaration, that minuteness of real property created no harsh suspicion of a dependent mind; for a harsh suspicion it is, and, by proving too much, proves nothing.

What caused the absurd, yet satal, distinction between property, personal and real? The seudal principle. What created another odious distinction between free and base holdings, and thus excluded copyholds of any value? The seudal principle. What introduced an order of men, called villains, transferable, like cattle, with the land which they stocked? The seudal principle. What excludes the holders of beneficial leases? The seudal principle. What made personalty, in those times, of little or no estimation? The seudal principle. What raised the filly notion, that the property, not the person, of the subject, was to be represented? The seudal principle. What prevented the large provision in

the act of Henry IV. by which all freeholders were declared electors, from being extended to all holders of property, however denominated, however inconsiderable? The same infernal principle, which then fubdued and stifled the genuine equalifing spirit of our constitution. Now, if we find that this demon was himself in process of time fubdued, as he certainly was by the extension of commerce under Elizabeth, and the enlarged conceptions which extended commerce always produces, by the revival of learning, which dispelled the darkness of Gothick ignorance, and by the great transactions of the last century, when the true theory and genuine principles of freedom were unfolded and illustrated, we shall not hesitate to pronounce, that, by the spirit of our constitution, all Englishmen, having property of any kind or quantity, are entitled to votes in chufing parliamentary delegates. The form foon received a cruel blemish; for, in the eighth of HENRY VI. the property of fuitors qualified to vote, was restrained to " forty shil-"lings a year above all charges," that is, to twenty pounds at least by the present value of money. I agree with those, who consider this act as bafely aristocratical, as a wicked invasion of clear popular rights, and therefore in a high degree unconstitutional: it is also a disgraceful confession of legislative weakness; for the evil, ALL SENCE AFFA

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pretended to be remedied by it, was, that the county elections were tumultuary. What! could not the wisdom of the legislature suggest a mode of preventing tumult, if the laws already substituting had been insufficient for that purpose, without shaking the obligation of all suture laws, by narrowing the circle of those, who, being affected by them, ought by natural equity to affish in framing them? Ridiculous and indefensible!

In the twelfth of CHARLES II. the mighty fabrick of the feudal fystem was shaken from its basis; but, though its ramparts were overset, its connexions and covered ways destroyed, and its very foundations convulsed, yet the ruins of it have been found replete with mischief, and the mischief operates, even while I speak.

At the Revolution, indeed, the good spirit of the constitution was called forth, and its fair principles expanded: it is only since that auspicious event, that, although we may laugh, when lawyers call their vast assemblage of sense and subtilty the perfection of human wisdom, yet we shall deride no man, who asserts the constitution of England to be in theory the most perfect of human systems—in theory, not in practice; for, although you are clearly entitled to all the advantages, which the principles of the constitution give you, while you claim those advantages by

cool and decent petition, yet, either from fome unaccountable narrowness in the managers of the Revolution, or from the novelty and difficulty of their fituation, they left their noble work fo unfinished, and the feudal poison so little exterminated, that, to use the words of your favourite poet, "they scotched the snake, not killed it." Who could have imagined, that, in the eighteenth of GEORGE II. the statute of Henry VI. would have been adopted and almost transcribed? Who could have dreamed, that, in the thirty-first of the fame king, the last act would have been recited and approved, with a declaration added, that no tenant by copy of court roll should vote at an election for knights of the shire under penalty of fifty pounds? It was the accurfed feudal principle, which fuggested these laws, when the fairest opportunity presented itself of renovating the constitution. Another gale has now sprung up; and, unless you catch it while it blows, it will be gone for ever.

I have proved, unless I delude myself, "that the "spirit of our constitution requires a representation "of the people nearly equal and nearly univer-"fal." Carry this proposition home with you, and keep it as an answer to those, who exclaim "that "the constitution ought not to be changed." I said nearly universal; for I admit, that our constitution, both in form and spirit, requires some pro-

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perty in electors, either real or personal, in posfession or in action; but I consider a fair trade or prosession as valuable property, and an Englishman, who can support himself by honest industry, though in a low station, has often a more independent mind than the prodigal owner of a large encumbered estate. When Prynne speaks of every inhabitant and commoner, to whom he supposes that the right of voting originally belonged, I cannot persuade myself, that he meaned to include such as, having nothing at all, and being unable or unwilling to gain any thing by art or labour, were supported by alms.

If modern authorities be demanded in aid of my opinions, I shall only mention the great judge, Sir William Blackstone, and I mention him the more willingly, because he never professed democratical fentiments, and, though we admire him as the fystematical arranger of our laws, yet we may fairly doubt the popularity of his political notions: nevertheless, he openly allows in his Commentary, "that the spirit of our consti-"tution is in favour of a more complete repre-" fentation of the people." This too is allowed by the very man, who, in another tract, intimates an opinion, "that the value of freeholds them-" felves should be greatly advanced above what is now required by law to give the proprietor " a voice in county elections." I told you, that

all reasoning from the statute of Henry VI. proved too much, and, consequently, nothing; for, who now would bear the idea of disqualifying those electors of Surry and Middlesex, whose freeholds were not of the annual value of twenty pounds?

I hear a murmur among you, and perceive other marks of impatience. Indulge me a moment, and I will descend; but let me not be misapprehended. I do not propose to conclude with a specifick motion: it is my deliberate opinion, confirmed by my observations on the event of your affociations to reduce the influence of the Crown, that your petitions and refolutions must be very general. In my own mind I go along with you to the full length of your wishes. If the present system of representation be justly compared to a tree rotten at the heart, I wish to see removed every particle of its rottenness, that a microscopick eye could discern. I deride many of the fashionable doctrines: that of virtual representation I hold to be actual folly; as childish, as if the were to talk of negative representation, and to contend, that it involved any positive idea. Substitute the word delegation or deputation, instead of representation, and you will instantly see the absurdity of the conceit. Does a man, who is virtually, not actually, re-

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presented, delegate or depute any person to make those laws, which may affect his property, his freedom, and his life? None; for he has no fuffrage. How then is he reprefented according to the principles of our constitution? As well might a Roman tyrant have urged, that all his vaffals were represented in his person: he was augur and high priest; the religious state was, therefore, represented by him: he was tribune of the people; the popular part of the nation were, therefore, represented: he was conful, dictator, master of the horse, every thing he pleased; the civil and military states were, therefore, concentrated in him; the next deduction would have been, that the slaves of his empire were free men. There is no end of abfurdities deducible from fo idle a play upon words.

That there may be an end of my address to you, which has been too long for the place and occasion, but too short for the subject, I resume my seat with a full conviction, that, if united, and dependent on Yourselves alone, you must succeed; if disunited, or too confident in others, you must fail. Be perfuaded also, that the people of England can only expect to be the happiest and most

glorious, while they are the freest, and can only become the freest, when they shall be the most virtuous, and most enlightened, of nations. AIL

Prasad Rao

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Sharma, PVSM,

General Baljit Si

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TO * * * *

me the American services

London, May 14, 1782.

SIR,

"n Daich

I TAKE the liberty of fubmitting to your ferious attention the Plan of National Defence lately fuggested by government, compared with a different plan now approved, though subject to revision, by a Company of Loyal Englishmen, of which I have the honour to be One. You will instantly see, that the first plan was nobly conceived by some great mind, and intended for the noblest purposes; but that, in the detail, it appears to be innovating, harsh, unconstitutional, and big with alarming consequences; too expensive for the treasury, who have no treasures to lavish, and too distrustful of a generous and spirited people, who would vigorously support a government that sincerely confided in them. The fecond plan you will find (and we pledge our honours to prove) already fanctioned, and even required, by Law, agreeable to the Constitution, and calculated to preserve it; not too expensive to real patriots, who will hardly be niggards at fuch a moment as this; and not at all dangerous to fo wife and just a government as the present. If nothing can raise a manly spirit, and excite a liberal emulation, in English gentlemen, yeomen, and traders, but the actual descent of three united armies on our coasts, they will then vainly solicit that protection for their houses and families, which they now have in their own hands, on a glorious invitation from the First and Best of Magistrates.

I am, &c.

A VOLUNTEER.

P. S. Give me leave to observe, that the Lords-Lieutenants, as such, have no more to do with this great business than the bench of Bishops.

ALL LESS CONTROLLED TO THE PROPERTY OF THE PRO

Prasad Rao

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General Baljit Si AVSM, VSM (R

General SK Sinha,

HEADS OF A PLAN

For raifing Corps in several principal Towns in Great Britain, inclosed in a Letter from the EARL of SHELBURNE to the CHIEF MAGISTRATES of several Cities and Towns.

tft. THE principal towns in Great Britain to furnish one or more battalions each, or a certain number of companies each, in proportion to their fize and number of inhabitants.

2d. The officers to be appointed from among the gentlemen of the neighbourhood, or the inhabitants of the faid towns, either by commission from his Majesty, or from the Lord-Lieutenant of the County, upon the recommendation of the Chief Magistrate of the town in which the Corps are raised.

3d. They are to be possessed of some certain estate in land or money, in proportion to their rank.

4th. An Adjutant or Town-Major in each town to be appointed by his Majesty.

5th. A proper number of Serjeants and Corporals from the army to be appointed for the Corps in each town, in proportion to their numbers.

6th. The faid Serjeants and Corporals, as well

as the Adjutant or Town-Major, to be in the Government pay.

7th. The men to exercise frequently, either in battalions, or by companies, on Sundays, and on Holidays, and also after their work is over in the evenings.

8th. Arms, accourrements, and ammunition, to be furnished at the expence of Government, if required.

9th. Proper magazines, or storehouses, to be chosen or erected in each town, for keeping the said arms, &c.

roth. The arms and accourrements to be delivered out at times of exercise only, and to be returned into the storehouses as soon as the exercise is finished.

11th. The Adjutant or Town-Major to be always prefent at exercise, and to see that the men afterwards march regularly, and lodge their arms in the storehouses.

12th. Proper penalties to be inflicted on fuch as absent themselves from exercises, as also for disobedience of orders, insolence to their officers, and other disorderly behaviour.

13th. The above Corps not to be obliged, on any account, or by any authority whatever, to move from their respective towns, except in times of actual invasion or rebellion.

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order the said corps to march to any part of Great Britain, as his services may require.

either separately, or in conjunction with his Majesty's regular forces, and be under the command of such General officers as his Majesty shall think proper to appoint.

16th. Both officers and men to receive full pay as his Majesty's other regiments of foot from the day of their march, and as long as they shall continue on service out of their towns.

17th. They are to be subject to military discipline, in the same manner as his Majesty's regular forces, during the said time of their being called out, and receiving government pay.

18th. All officers who should be disabled in actual service to be entitled to half-pay, and all non-commissioned officers and private men, disabled, to receive the benefit of Chelsea Hospital.

19th. The widows of officers killed in the fervice to have a penfion for life.

20th. The time of fervice to be named.

SKETCH OF A PLAN

THE RESIDENCE OF COMMON

For raising a Constitutional Force in the Towns, Cities, and Counties of Great Britain; being an Answer, Article by Article, to the Plan annexed.

Ist. AGREED, with this addition—And other Battalions, or Companies, to be also voluntarily formed out of the Hundreds, Tythings, and Hamlets, of each county, in proportion to its extent and populousness.

2d. The Officers, and, in some companies, the men, to enrol themselves, from among the Gentry, Yeomanry, and Substantial Householders, and the Officers to be commissioned respectively by the High Sheriff, and Chief Magistrate, of each county and town.

3d. The ranks of the Officers to be proportioned to their contributions to a fund raifed for purposes mentioned in subsequent articles.

4th. An Adjutant or Town-Major in each county or town, to be elected by the Officers.

5th. Agreed, for the purpose of drilling the men, until a certain number of the volunteers can be qualified to act as Serjeants and Corporals.

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6th. The faid Drill-Serjeants and Corporals from the army to continue in the pay of government; but the Adjutants and Town-Majors to be paid, if they desire pay, out of a fund voluntarily raised for that purpose in the several counties and towns.

7th. Agreed.

8th. Arms, Accourrements, and Ammunition, to be furnished at the expense of the counties and towns, if required; or of the officers, if they are generously disposed.

9th. The said arms, &c. to be kept by each man, in bis own bouse, for his legal protection.

noth. Rejected.

that the men march regularly, and return home with their arms.

Laws, or Articles, to be drawn up by the Officers, and fubscribed or openly consented to by the men, after a distinct reading and explanation of each article. "Consensus facit Legem."

13th. Agreed, the words counties or being inferted after the word respective.

14th. The bigh sheriff of each county, and chief magistrate of each town, shall then (on due notice to government) have power to order the said corps to march to any part of

Great Britain, as the publick service may require.

15th. Agreed, in case of actual invasion; but in riots the magistrates to call out their respective corps: and, as to rebellion, or civil war, (which God avert!) no specifick provisions can be made for so dreadful and improbable an event.

16th. The counties and towns to pay the men who require it; but such, as enrol them-felves without pay, to wear some mark of distinction, and the officers to serve at their own expense.

17th. Agreed, in case of actual invasion only; but the words, and receiving government pay, to be omitted.

18th. Officers disabled in actual service to be rewarded by a new order (as a star and ribband, orange coloured or mixed), or by an eulogium praclaimed and recorded by the sheriffs of their several counties, or the chief magistrates of their corporate towns; and the men to receive a comfortable subsistence at their own homes, with a fixed annuity for life out of the voluntary fund.

19th. The widows and children of Officers and Men killed in the fervice against invaders to have also pensions for life.

A TABLE AFF

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20th. The companies called out as above to be discharged ipso sacto, as soon as the invaders are repelled, or the particular service terminated.

A Company of LOYAL ENGLISH
GENTLEMEN.

THE

PRINCIPLES OF GOVERNMENT,

in

A DIALOGUE

BETWEEN

A GENTLEMAN AND A FARMER.

ALO ALL ENCEAFF

Prasad Rao

riq Ahmed Karin

Sharma, PVSM,

General Baljit Si AVSM, VSM (R

Jeneral SK Sinha,

ADVERTISEMENT.

A SHORT defence hath been thought necessary, against a violent and groundless attack upon the FLINTSHIRE COMMITTEE, for having testified their approbation of the following Dialogue, which hath been publickly branded with the most injurious epithets; and it is conceived, that the sure way, to vindicate this little Tract from so unjust a character, will be as publickly to produce it.— The friends of the Revolution will instantly see, that it contains no principle, which has not the support of the highest authority, as well as the clearest reason.

If the doctrines which it flightly touches, in a manner fuited to the nature of the Dialogue, be "feditious, treasonable, and diabolical," Lord Somers was an incendiary, Locke a traitor, and the Convention-parliament a pandæmonium; but, if those names are the glory and boast of England, and if that convention secured our liberty and happiness, then the doctrines in question are not only just and rational but constitutional and salutary; and the reproachful epithets belong wholly to the system of those, who so grossly misapplied them.

PRINCIPLES OF GOVERNMENT.

- F. WHY should humble men, like me, sign or set marks to petitions of this nature? It is better for us Farmers to mind our husbandry, and leave what we cannot comprehend to the King and Parliament.
- G. You can comprehend more than you imagine; and, as a free member of a free state, have higher things to mind than you may conceive.
- F. If by free you mean out of prison, I hope to continue so, as long as I can pay my rent to the 'squire's bailiss; but what is meant by a free state?
- G. Tell me first what is meant by a club in the village, of which I know you to be a member.
- F. It is an affembly of men, who meet after work every Saturday to be merry and happy for a few hours in the week.
 - G. Have you no other object but mirth?
 - F. Yes; we have a box, into which we con-

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a number; but we should be the majority with justice on our side.

G. A word or two on another head. Some of you, I presume, are no great accountants.

F. Few of us understand accounts; but we trust old Lilly the schoolmaster, whom we believe to be an honest man; and he keeps the key of our box.

G. If your money should in time amount to a large sum, it might not perhaps be safe, to keep it at his house or in any private house.

F. Where elfe should we keep it?

G. You might chuse to put it into the funds, or to lend it the 'squire; who has lost so much lately at Newmarket, taking his bond or some of his fields as your security for payment with interest.

F. We must in that case confide in young Spelman, who will soon set up for himself, and, if a lawyer can be honest, will be an honest lawyer.

G. What power do you give to Lilly, or should you give to Spelman in the case sup-

pofed?

F. No power. We should give them both a due allowance for their trouble, and should expect a faithful account of all they had done for us.

G. Honest men may change their nature. What, if both or either of them were to deceive you.

F. We should remove them, put our trust in better men, and try to repair our loss.

G. Did it never occur to you, that every state or nation was only a great club?

F. Nothing ever occurred to me on the fubject; for I never thought about it.

G. Though you never thought before on the fubject, yet you may be able to tell me, why you suppose men to have affembled, and to have formed nations, communities, or states, which all mean the same thing.

F. In order, I should imagine, to be as happy as they can, while they live.

G. By happy do you mean merry only?

F. To be as merry as they can without hurting themselves or their neighbours, but chiefly to secure themselves from danger, and to relieve their wants.

G. Do you believe, that any King or Emperor compelled them fo to affociate?

F. How could one man compel a multitude? A King or an Emperor, I prefume, is not born with a hundred hands.

G. When a prince of the blood shall in any country be so distinguished by nature, I shall then, and

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then only, conceive him to be a greater man than you. But might not an army, with a King or General at their head, have compelled them to allemble?

F. Yes; but the army must have been formed by their own choice. One man or a few can never govern many without their consent.

G. Suppose, however, that a multitude of men, assembled in a town or city, were to chuse a King or Governor, might they not give him high power and authority?

F. To be fure; but they would never be fo mad, I hope, as to give him a power of making

their laws.

G. Who else should make them?

F. The whole nation or people.

G. What, if they disagreed?

F. The opinion of the greater number, as in our village-clubs, must be taken and prevail.

G. What could be done, if the fociety were fo large, that all could not meet in the fame place?

F. A greater number must chuse a less.

G. Who should be the chusers?

F. All, who are not upon the parish. In our club, if a man asks relief of the overseer, he ceases to be one of us, because he must depend on the overseer.

G. Could not a few men, one in feven for inftance, chuse the assembly of law-makers as well as a larger number?

F. As conveniently, perhaps; but I would not fuffer any man to chuse another, who was to make laws, by which my money or my life might be taken from me.

G. Have you a freehold in any county of forty shillings a year?

F. I have nothing in the world but my cattle, implements of hufbandry, and household goods, together with my farm, for which I pay a fixed rent to the 'fquire.

G. Have you a vote in any city or borough?

F. I have no vote at all; but am able by my honest labour to support my wife and four children; and, whilst I act honestly, I may defy the laws.

G. Can you be ignorant, that the Parliament, to which members are fent by this county, and by the next market-town, have power to make new laws, by which you and your family may be stripped of your goods, thrown into prison, and even deprived of life?

F. A dreadful power! I never made inquiries, having business of my own, concerning the business of Parliament, but imagined, that the laws had been fixed for many hundred years.



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- G. The common laws, to which you refer, are equal, just, and humane; but the King and Parliament may alter them, when they please.
- F. The King ought, therefore, to be a good man, and the Parliament to consist of men equally good.
- G. The King alone can do no harm; but who must judge the goodness of Parliament-men?
- F. All those whose property, freedom, and lives may be affected by their laws.
- G. Yet fix men in feven, who inhabit this kingdom, have, like you, no votes; and the petition, which I defired you to fign, has nothing for its object, but the restoration of you all to the right of chusing those law-makers, by whom your money or your lives may be taken from you. Attend, while I read it distinctly.
- F. Give me your pen—I never wrote my name, ill as it may be written, with greater eagerness.
- G. I applaud you, and trust, that your example will be followed by millions. Another word before we part. Recollect your opinion about your club in the village, and tell me what ought to be the consequence, if the King alone were to insist on making laws, or on altering them at his will and pleasure.
 - F. He too must be expelled,

- G. Oh! but think of his flanding army and of the militia, which now are his in substance, though ours in form.
- F. If he were to employ that force against the nation, they would and ought to refiss him, or the state would cease to be a state.
- G. What, if the great accountants and great lawyers, the Lillys and Spelmans, of the nation were to abuse their trust, and cruelly injure, instead of faithfully serving, the publick?
- F. We must request the King to remove them, and make trial of others, but none should implicitly be trusted.
- G. But what, if a few great lords or wealthy men were to keep the king himself in subjection, yet exert his force, lavish his treasure, and misuse his name, so as to domineer over the people, and manage the Parliament.
 - F. We must fight for the King and ourselves.
- G. You talk of fighting, as if you were speaking of some rustick engagement at a wake; but your quarter-staffs would avail you little against bayonets.
- F. We might eafily provide ourselves with better arms.
- G. Not so easily; when the moment of refistance came, you would be deprived of all arms; and those who should furnish you with

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them, or exhort you to take them up, would be called traitors, and probably put to death.

F. We ought always, therefore, to be ready; and keep each of us a strong sirelock in the corner of his bed-room.

G. That would be legal as well as rational, Are you, my honest friend, provided with a musket?

F. I will contribute no more to the club, and purchase a firelock with my savings.

G. It is not necessary—I have two, and will make you a present of one with complete accourrements.

F. I accept it thankfully, and will converse with you at your leifure on other subjects of this kind.

G. In the mean while, spend an hour every morning in the next fortnight in learning to prime and load expeditiously, and to fire and charge with bayonet firmly and regularly. I say every morning; because, if you exercise too late in the evening, you may fall into some of the legal snares, which have been spread for you by those gentlemen, who would rather secure game for their table, than liberty for the nation.

F, Some of my neighbours, who have ferved in the militia, will readily teach me; and, per-

haps, the whole village may be perfuaded to procure arms, and learn their exercise.

- G. It cannot be expected, that the villagers should purchase arms, but they might easily be supplied, if the gentry of the nation would spare a little from their vices and luxury.
- F. May they turn to some sense of honour and virtue!
- G. Farewell, at prefent; and remember, that a free state is only a more numerous and more powerful club, and that he only is a free man, who is member of such a state."
- F. Good morning, Sir! You have made me wifer and better than I was yesterday; and yet, methinks, I had some knowledge in my own mind of this great subject, and have been a politician all my life without perceiving it.

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THE CHARACTER

OF

JOHN LORD ASHBURTON.

THE publick are here presented not with a fine picture, but a faithful portrait, with the character of a memorable and illustrious man, not in the style of panegyrick on a monument, but in the language of sober truth, which friendship itself could not induce the writer to violate.

JOHN DUNNING (a name to which no title could add lustre) possessed professional talents which may truly be called inimitable; for, besides their superlative excellence, they were peculiarly his own; and as it would scarcely be possible to copy them, so it is hardly probable that nature or education will give them to another. His language was always pure, always elegant; and the best words dropped easily from his lips into the best places with a sluency at all times astonishing, and, when he had perfect health, really melodious: his style of speaking consisted of all the turns, oppositions, and sigures, which

the old Rhetoricians taught, and which Civero frequently practifed, but which the auftere and folemn spirit of Demosthenes refused to adopt from his first master, and seldom admitted into his orations, political or forensick.

Many at the bar and on the bench thought this a vitiated style; but, though dissatisfied as criticks, yet, to the confusion of all criticism, they were transported as hearers. That faculty, however, in which no mortal ever surpassed him. and which all found irrefistible, was his wit. This relieved the weary, calmed the refentful, and animated the drowfy: this drew smiles even from fuch as were the objects of it; scattered flowers over a defert; and, like fun-beams fparkling on a lake, gave spirit and vivacity to the dullest and least interesting cause. Not that his accomplishments, as an advocate, consisted principally in volubility of speech or liveliness of raillery. He was endued with an intellect, fedate, yet penetrating; clear, yet profound; subtle, yet strong. His knowledge too was equal to his imagination, and his memory to his knowledge. He was no less deeply learned in the sublime principles of jurisprudence and the particular laws of his country, than accurately skilled in the minute, but useful, practice of all our different courts. In the nice conduct of a complicated AL

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cause, no particle of evidence could escape his vigilant attention, no shade of argument could elude his comprehensive reason. Perhaps the vivacity of his imagination sometimes prompted him to fport where it would have been wifer to argue; and, perhaps, the exactness of his memory sometimes induced him to answer such remarks as hardly deserved notice, and to enlarge on small circumstances which added little to the weight of his argument: but those only who have experienced can, in any degree, conceive the difficulty of exerting all the mental faculties in one instant, when the least deliberation might lose the tide of action irrecoverably. The people feldom err in appreciating the character of speakers; and those clients who were too late to engage Dunning on their fide, never thought themselves secure of fuccess, while those against whom he was engaged were always apprehensive of a defeat.

As a lawyer, he knew that Britain could only be happily governed on the principles of her conflitution, or publick law; that the regal power was limited, and popular rights ascertained by it; but that the aristocracy had no other power than that which too naturally results from property, and which laws ought rather to weaken than fortify: he was, therefore, an equal supporter of

just prerogative, and of national freedom, weighing both in the noble balance of our recorded constitution. An able and aspiring statesman, who professed the same principles, had the wisdom to folicit, and the merit to obtain, the friendship of this great man; and a connection, planted originally on the firm ground of fimilarity in political fentiments, ripened into personal affection which nothing but death could have diffolved or impaired. Whether in his ministerial station he might not suffer a few prejudices infenfibly to creep on his mind, as the best men have suffered because they were men, may admit of a doubt; but, if even prejudiced, he was never uncandid, and though pertinacious in all his opinions, he had great indulgence for fuch as differed from him.

His fense of honour was losty and heroick; his integrity stern and inflexible; and though he had a strong inclination to splendour of life, with a taste for all the elegancies of society, yet no love of dignity, of wealth, or of pleasure, could have tempted him to deviate, in a single instance, from the straight line of truth and honesty. He carried his democratical principles even into social life, where he claimed no more of the conversation than his just share, and was always candidly attentive, when it was his turn to be a hearer. His enmities were strong, yet placable;

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but his friendships were eternal; and if his affections ever fubdued his judgment, it must have been in cases, where the same or interest of a friend were nearly concerned. The veneration with which he constantly treated his father, whom his fortunes and reputation had made the happiest of mortals, could be equalled only by the amiable tenderness which he shewed as a parent. He used to speak with wonder and abhorrence of Swift, who was not ashamed to leave a written declaration, "that he could never be fond of children;" and with applause of the caliph, who, on the eve of a decifive battle, which was won by his valour and wifdom, amused himself in his tent with seeing his children ride on his scymitar, and play with his turban, and dismissed a general, as unlikely to treat the army with lenity, who durst reprove him for fo natural and innocent a recreation.

For fome months before his death, the nursery had been his chief delight, and gave him more pleasure than the cabinet could have afforded: but this parental affection, which had been a source of so much felicity, was probably a cause of his fatal illness. He had lost one son, and expected to lose the other, when the author of this painful tribute to his memory parted from him with tears in his eyes, little hoping to see him again in a perishable state.—As he perceives,

without affectation, that his tears now steal from him, and begin to moisten the paper on which he writes, he reluctantly leaves a subject, which he could not soon have exhausted; and when he also shall resign his life to the great Giver of it, he desires no other decoration of this humble grave-stone than this honourable truth:

With none to flatter, none to recommend, DUNNING approv'd and mark'd him as a friend.

END OF THE SIXTH VOLUME.

Prasad Rao

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